No. 2739

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO, by His Guardian *ad Litem*, LEON BEN-EZRA,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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Attorneys for the Defendants in Error.

[1*]

*Page-number appearing at foot of page of original certified Record.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1585.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO, by His Guardian *ad Litem* LEON BENEZRA,
Defendants in Error.

Praecipe for Transcript.

To the Clerk of the United States District Court for the Western District of Washington, Southern Division:

You will please prepare copies of the following papers to constitute transcript on writ of error in the above-entitled cause, the caption (excepting on the complaint), all endorsements, verifications and acceptances of service, etc., to be omitted. Transcript to be printed according to the Circuit Court of Appeals rules:

Amended complaint.
Answer of defendant.
Reply to answer.
Motions for directed verdict.
Verdict.
Judgment.
Bill of exceptions.

Order settling bill of exceptions.
Order allowing writ of error.
Assignment of errors.
Cost and supersedeas bond, with approval of the court thereon.
Stipulation as to exhibits.
Order directing the original exhibits to be transmitted.
Stipulation relating to transcript.
Admission of service of order allowing writ of error, etc.

You will also transmit with the original citation and other papers which are required to be transmitted the original acceptance of service of writ of citation upon the defendants in error.

This praecipe.

J. B. BRIDGES,
BRIDGES & BRUNNER,
SULLIVAN & CHRISTIAN,
Attorneys for Plaintiff in Error.

(Filed Jan. 12, 1916.) [2]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 1585.

ESTHER ROMI PENSO and BENSIOR PENSO, by His Guardian *ad Litem,* LEON BENEZRA,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILWAY & NAVIGATION COMPANY, a Corporation,

Defendant.

Second Amended Complaint.

Comes now the above-named plaintiff, Esther Romi Penso for herself, and Bensior Penso, by his guardian *ad litem,* Leon Benezra, and complaining of the above-named defendant, Oregon-Washington Railway & Navigation Co., a corporation, alleges as follows:

I.

That on the 11th day of April, 1914, Bensior Penso was a minor of the age of eleven years; that Leon Benezra is the duly appointed, qualified and acting guardian *ad litem* of the said person and estate of Bensior Jenso, a minor, having been appointed such guardian *ad litem* on the 11th day of April, 1914, and as such guardian *ad litem* has been duly authorized to prosecute this action for and on behalf of said minor.

2.

That the said plaintiff, Esther Romi Penso, was

the wife of the said Haim Jack Penso, and that the plaintiff, Bensior Penso, a minor appearing by his guardian *ad litem,* Leon Benezra, is the son of the said Haim Jack Penso, deceased.

3. [3]

That the defendant, Oregon-Washington Railway & Navigation Company, is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and engaged in the operation of a line of railway in the State of Washington, and particularly in Chehalis County and at Hoquiam, in said State.

4.

That on or about the 4th day of November, 1913, at about the hour of six o'clock in the evening, the said Haim Jack Penso was returning from his place of occupation in East Hoquiam to his boarding-house in West Hoquiam; That in so doing, it was his custom and that of his fellow workmen to cross the Hoquiam River from East Hoquiam to West Hoquiam over the bridge of the Northern Pacific Railway Company, and said bridge was used for a common passageway by the said Penso and many other persons, with the knowledge and consent of the Northern Pacific Railway Company and of the defendant; that such practice had been continued for some years and was at the invitation of the defendant and the said Northern Pacific Railway Company, which invitation, practice and custom was well known to the defendant, its agents, officers and employees.

5.

That on the night in question, the said Haim Jack Penso, following the said custom and accepting the said invitation was in the act of crossing said bridge, as aforesaid, and had reached a point somewhere near the middle of said bridge when a certain passenger car, propelled by gasoline engines, and known as a gasoline motor car, owned and operated by the defendant, approached said bridge and [4] the point where the said Haim Jack Penso was crossing said bridge, at a high and unusual rate of speed, and was carelessly and negligently driven upon the said *Ham* Jack Penso in such a careless and negligent manner that the said Haim Jack Penso was knocked from the bridge into the waters of the Hoquiam River and was either killed by the striking of the car or drowned as a result of being knocked from said bridge. That as before alleged, the car was negligently and carelessly driven and at a high rate of speed, that the said Haim Jack Penso was in plain view for a considerable period of time before he was struck by said car. That he sought, by every means in his power, to escape from said car, but that said car was carelessly and negligently driven upon him and no effort or attempt was made upon the part of the engineer or motorman of said car to slacken the speed of the same, or in any manner attempt to prevent said car from striking the said Penso. That the said *Hami* Jack Penso, was in plain view of the employees of the defendant operating and driving said car, and particularly the engineer or motorman, of the car, for a distance of four hundred feet from

the point where he was struck, and his efforts to escape were, or could have been, plainly seen by the said engineer or motorman, but that as before alleged, said engineer or motorman carelessly and negligently drove said car upon him and caused his death.

6.

That said Haim Jack Penso was an able-bodied man of the age of —— years, capable of earning two and 50/100 dollars ($2.50) per day. [5]

7.

That as before alleged, the said Haim Jack Penso was the husband and father, respectively, of the plaintiffs, that by reason of the foregoing facts they have been deprived of the financial support afforded them by the said Haim Jack Penso, and of nurture and of the intellectual, moral and physical training which only a parent can give to his children, and have further been deprived of a prudent, kind and affectionate husband and father, which was material to their comfort and valuable as counsel to the wife and children of said deceased whereby they have been injured in the sum of Twenty Thousand Dollars ($20,000).

WHEREFORE, The plaintiffs pray for damages against the defendant in the sum of Twenty Thousand Dollars ($20,000), for their costs and disbursements in this action, and for such other and further

relief as to the Court may seem just.

MORGAN & BREWER,
Attorneys for Plaintiff.

(Verification.)

(Filed July 31, 1914.) [6]

Answer to Second Amended Complaint.

The Oregon-Washington Railroad & Navigation Company, defendant, answers the second amended complaint herein, as follows:

I.

Answering the allegations contained in paragraph 1, it says that it has no knowledge or information sufficient concerning the truth of the matters and things therein set out, to form a belief, wherefore it denies each and every allegation in said paragraph.

II.

Answering paragraph 2, it says that it has not knowledge or information sufficient to form a belief as to the truth of the matters and things contained in paragraph 2, of the said complaint, wherefore it denies each and every of said allegations.

III.

Answering that part of paragraph 4, which alleges that on or about the date and time therein mentioned the person therein mentioned was returning from his place of business to his boarding-house, and that in so doing it was his custom and that of his fellow workmen, to cross the Hoquiam River as in said paragraph set out, it says that it has not knowledge or information sufficient to form a belief as to the

truth thereof, wherefore it denies the same, and it denies that the said bridge was used for a common passageway by the said Penso and others, *and denies that the said bridge was used as a common passageway by the said Penso and others,* with the knowledge and consent of the said defendant, and denies that the practice of the said Penso and others to use the said bridge as in said paragraph [7] set out, had continued for some years, and denies that the said Penso or others crossed upon the said bridge at the invitation of the said defendant or the said Northern Pacific Railway Company, and denies that the said defendant had knowledge of the custom and practice, as alleged in said paragraph.

IV.

Denies each and every allegation contained in paragraph 5.

V.

It says that it has not knowledge or information sufficient to form a belief as to the truth of the matters and things set out in paragraph 6, wherefore it denies each and every allegation in said paragraph contained.

VI.

It denies each and every allegation contained in paragraph 7, and particularly denies that the said plaintiffs have been damaged or injured in the sum of $20,000 or in any other sum whatsoever.

And further answering unto the said amended complaint and by way of a first affirmative answer, the defendant alleges.

1.

That it has complied with all the laws of the State of Washington with reference to foreign corporations, and has seasonably paid its license fees to the State of Washington.

2.

That at all of the times mentioned in the complaint the defendant had certain arrangements with the Northern Pacific Railway Company for the use of the latter's bridge across the Hoquiam River; that at all said times the said bridge was strictly a railroad bridge and was in no respects constructed or provided for the use thereof by persons walking, and that during all of [8] such times all persons were strictly prohibited from using the said bridge by walking over or across the same, and that if on the occasion mentioned in the complaint herein, the said Penso did walk upon, over and across the said bridge, he did same with full knowledge that such bridge was only a railroad bridge and was not constructed for or intended to be used by persons walking, and that all persons were forbidden and prohibited to go upon or walk across the said bridge, and that during all such times the said Penso well knew that the said bridge was constantly used by the said railroads and other railroads, in taking cars and trains across the same, and well knew that a railroad train or engine might cross upon the said bridge at almost any time of the day or night, and well knew and appreciated the great dangers incident to undertaking to walk across the said bridge, and knew and appreciated that it was dangerous for persons to walk across said

bridge at any time during the day or night, and defendant alleges that if the said Penso did at or about the time in said complaint mentioned, undertake to walk across the said bridge, he did so with full knowledge that the said bridge was not a foot bridge, and with full knowledge that it was exceedingly dangerous for him so to do, and with full appreciation of all the dangers incident to walking across the said bridge, and that if he went upon and undertook to walk across the said bridge as set out in the complaint, he thereby assumed all of the risks and dangers incident to so doing, and if he was injured while walking across the said bridge or while being thereupon, he should not be permitted to have any recovery herein, because of his knowledge of the dangers and his assumption of all such dangers and risks.

And the said defendant further answering the said complaint [9] and by way of a second affirmative defense, alleges:

1.

It alleges each and every allegation contained in paragraph I, of the first affirmative defense herein.

2.

That at all of the times mentioned in the complaint, the bridge across the Hoquiam River and hereinbefore mentioned, was intended to be used only for the carrying of trains and cars upon the same and over and across the said Hoquiam River, and that said bridge was not in anywise provided or construed for foot travellers, and that during all the times mentioned in the complaint and for a long time prior

thereto, the said Penso had full knowledge that the said bridge was not constructed for or intended to be used by persons walking across the same, and knew that all persons were forbidden to walk upon or across the said bridge, and knew the said bridge was used extensively for taking trains across the same, and knew that trains were liable to cross the same at any time of day or night, and particularly knew that the defendant's gasoline car mentioned in the complaint; was scheduled to leave Hoquiam for Montesano, so as to cross the said bridge at the time it is alleged in the complaint the said Penso was injured on the said bridge; that at approximately the time mentioned in the complaint, the said gasoline car, on its regular trip aforesaid, reached the said bridge and approached and went upon the westerly end thereof, very slowly, and that at said time the said car had burning a very strong headlight, which could have been seen by any person undertaking to cross the said bridge, long before he would get upon the said bridge or in a place of danger, and that at the said time it was very dark and windy and raining. [10]

3.

That if at the time mentioned in the complaint, the said Penso undertook to cross the said bridge, he was negligent in so doing and his negligence materially contributed to his injury, if he were injured, in the following manner, to wit: That the said Penso was negligent in going upon the said bridge for the purpose of crossing the same or otherwise, for the reason that the said bridge was not prepared for nor used

by persons travelling afoot, and he was further negligent in going upon the said bridge, for the reason that he knew that trains were liable to cross the said bridge at any time, and particularly knew that defendant's gas car was due on its regular trip, to cross the said bridge from the west, at the time alleged in the complaint; that if the said Penso did at the time aforesaid, undertake to cross over the said bridge, he was further negligent in not observing the headlight and the approach of the said car and getting out of the way of danger by coming in contact with the said car, and that if he was injured, his injury was the result of his own negligence in getting or jumping in front of the said car as it was moving along, and in failing, upon seeing or hearing the approach of the said car, to get out of the way and avoid danger of being run into by such car, and if the said Penso was injured at or about the time set out in the complaint, his injury was du*ly* solely to his own fault and his own carelessness and without any fault or carelessness upon the part of the defendant or its employees.

WHEREFORE the defendant prays that the plaintiffs take nothing by their action and that defendant may go hence without day and recover its proper costs and disbursements herein.

BRIDGES & BRUENER,
BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

(Verification.)

(Filed Sept. 18, 1914.) [11]

Reply.

Comes now the plaintiff, and for reply to the first affirmative answer and defense of the defendant, and for reply to the second answer and defense, denies each and every allegation therein contained.

MORGAN AND BREWER,
Attorneys for Plaintiff.

(Verification.)
(Filed Sept. 19, 1914. [12]

Motion (For a Directed Verdict).

The evidence being in and both parties having rested, the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Esther Romi Penso, on the ground that the evidence is insufficient to submit the case to the jury.

BRIDGES & BRUENER,
SULLIVAN & CHRISTIAN,
Attorneys for Defendant.

(Filed Oct. 27, 1915.) [13]

Motion (For a Directed Verdict).

The evidence being in and both parties having rested, the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Bensior Penso, on the ground that the evidence is insufficient to submit the case to the jury.

BRIDGES & BREUNER,
SULLIVAN & CHRISTIAN,
Attorneys for Defendant.

(Filed Oct. 27, 1915.) [14]

Verdict.

We, the jury empanelled in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of Twenty-five Hundred Dollars ($2,500).

MEYER JACOB,
Foreman.

(Filed Oct. 28, 1915.) **[15]**

Judgment.

This cause having come on to be heard upon the issues of fact, before the above-entitled court, and a jury, at Tacoma, Washington, on the 26th day of October, A. D. 1915, and evidence on behalf of the plaintiffs and defendant having been heard, and the cause having been submitted to a jury, and the jury having heretofore returned a verdict in favor of the plaintiffs, and against the defendant, in the sum of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500), now, therefore,

IT IS ORDERED, ADJUDGED, and DECREED: That the plaintiffs do have and recover of and from the defendant, the sum of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500), with their costs to be taxed at the sum of $175.80 Dollars:

Dated this 1st day of Nov. A. D. 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Nov. 1, 1915.) **[16]**

Bill of Exceptions.

Be it remembered that heretofore on the 26th day of October, 1915, the above cause came on for trial before the Honorable Edward E. Cushman, Judge, and a jury, Morgan & Brewer and A. E. Cross appearing as attorneys and counsel for plaintiff, and J. B. Bridges, Sullivan & Christian, and Bogle, Graves, Merritt & Bogle, appearing as attorneys and counsel for defendant, whereupon the following proceedings were had and testimony taken, to wit:

Plaintiff offered in evidence a certified copy of the plat of Hoquiam Tide and Shore Lands and the dedication thereof as made by the Commissioner of Public Lands of the State of Washington, showing the dedication of June 10, 1895, for the purpose, as counsel stated, of showing the nature of the street over which the railroad ran and upon which the bridge mentioned in the pleadings was located.

Defendant's counsel objected to the introduction of this in evidence on the ground that the same was immaterial and that it made no difference whether the bridge was a prolongation of the street or not. [17]

The Court overruled the objection. To which ruling of the Court the defendant excepted, and the exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 1.

Plaintiff's counsel then offered in evidence a certified copy of the rededication of the same lands by the same office, being Plat 2, Hoquiam Tide and

Shore Lands, filed on the 21st day of July, 1913, and purporting to show the railroad bridge in question. Counsel stated that this was offered in evidence to show the present status.

To the introduction of this in evidence defendant's counsel objected, upon the same ground as that made to the previous offer; that it was immaterial.

The Court overruled the objection. To which ruling of the Court defendant excepted and the exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 2.

Counsel for plaintiff then offered in evidence Ordinance No. 70 of the city of Hoquiam, an ordinance granting a franchise to the railway company to operate over this street, which appeared upon its face to have been granted to Harry C. Heermans; the copy being under the seal of the city and the clerk of the city of Hoquiam. Counsel stating that it was offered for the purpose of showing the public nature of the highway or street over which the railway ran, and that plaintiffs would connect the ordinance up with the railway company by showing the transfer to the Northern Pacific.

To which counsel for defendant objected upon the ground that the same was immaterial; stating that the injury, if it occurred at all, occurred on the bridge which spans the Hoquiam River and that it would be wholly immaterial that the [18] railroad company had a right to operate on the street on one side or the other, or both sides of the bridge.

The Court overruled the objection. To which ruling of the Court the defendant excepted and the

exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 3.

Counsel for plaintiff offered in evidence the proceedings of the city council of the city of Hoquiam, under the seal of the city, and certified by the clerk, showing the transfer of the ordinance last referred to to the Northern Pacific Railway Company and stated that this was defendant's authority for building a bridge where the bridge was then built, showing a transfer from Mr. Heermans to it.

To this counsel for defendant objected on the ground that it was immaterial. The Court overruled the objection. To which ruling of the Court defendant excepted and the exception was allowed. The paper was admitted in evidence, marked Plaintiff's Exhibit 4.

Testimony of Leon Benezra, for Plaintiff.

LEON BENEZRA, a witness on behalf of plaintiff, testified as follows:

That he was then living at Seattle, Washington, and had been living there for a year past. That he formerly lived at Hoquiam about four and a half years. That he knew the deceased, Haim Jack Penso, during his lifetime; that the deceased was always his chum; that witness did all of his work with him; and that they lived together at the same place and associated together. That he first became acquainted with the deceased in 1910 in Hoquiam. That he knew deceased's **[19]** brother and when he went to Hoquiam he met deceased there and this was the way he became acquainted with the de-

(Testimony of Leon Benezra.)

ceased. That he knew the deceased's brother in Europe, and became acquainted with the decased in 1910. That at that time the deceased worked at the National Lumber Company carrying slabs for the fire at the fire-box. That he worked there over two years, then he quit and worked somewhere in Aberdeen, he did not know where, and then deceased came back to the Coats Shingle Co. and worked about fourteen or sixteen months carrying blocks to the sawyers. That the deceased and witness lived in the same house—503 6th street, on the east side of the Hoquiam River. That they lived there about fifteen or sixteen months, something like that. That the Coats Shingle Co. was at the foot of Ontario street on the opposite side of the Hoquiam River from where they lived. That it took fifteen or twenty minutes to walk from the bridge referred *to the* Coats Shingle Co. Four months before Penso was killed the witness left Hoquiam for Seattle. That when Penso was killed witness was going to San Francisco by water. Witness left Seattle November 1st and November 4th Penso was killed and after fifteen days he wired to Penso's brother, whom he knew in Europe. That he became acquainted with Penso's brother when he was in Greece working for the Turkish Consulate at Patras. That he also met Penso's brother in the United States. That he was the same nationality as witness.

That he became acquainted with the deceased at Hoquiam in 1910, through correspondence. That

(Testimony of Leon Benezra.)

he was the guardian *ad litem* of the child in this action, and was the Leon Benezra mentioned in the complaint as the guardian *ad litem* of Bensoir Penso. **[20]**

That he was not personally acquainted with the family of the deceased. That he had had correspondence with the plaintiff, Romi Penso, prior to the death of the decedent.

Then witness was asked the following question by plaintiff's counsel: "At whose request did you correspond with her?"

To this question defendant's counsel objected as incompetent, immaterial and irrelevant. The objection was overruled by the Court. Defendant excepted and the exception was allowed. Witness answered that he wrote to Romi Penso when her husband was killed.

Witness then further testified that during the lifetime of the deceased, and at his request, witness wrote to a person calling herself Esther Romi Penso. That he used to write to her once a month, sometimes twice a month, at deceased's request. That witness received letters from Romi Penso. That he used to have an answer for almost every letter. That this continued during all the time he was living at Hoquiam—4½ years. That *he* letters which he wrote to Romi Penso were directed to different addresses. Sometimes to her mother's and sometimes to her uncle's address, at Dardanelles, Turkey. That the deceased was a Turkish subject of Jewish nationality.

Testimony of Chelbom Ameri, for Plaintiff.

CHELBOM AMERI, a witness for plaintiff, testified as follows:

That he knew Haim Penso, deceased, during his lifetime. That he had known him since he was a boy. He was his cousin. Knew him at Dardanelles, Turkey. That he knew deceased's wife and his boy. That he had known deceased's boy since he was born. That he lived just two houses away from him. He [21] was his neighbor. That he knew Haim Penso and Esther Romi Penso were married. He was there when they were married. That they were married fourteen years ago. The boy age twelve years, deceased age 39 years, witness age 31 years, age of wife of deceased 35 years. That witness had known Penso since witness was born. That he lived by deceased about 19 years in Turkey, at Dardanelles. That he did not know when deceased came to this country. That he saw him after deceased came here. That witness came to this country first—11 years ago. That he thought the deceased had been in the United States five or six years. That witness was a laboring man. That deceased worked for a living in a sawmill at Hoquiam. That he never had any letters from the family of the deceased. That witness did not have any other relations in this country. That he now lived back in New York. That he saw the deceased last about two years before his death, at Seattle.

That back in Turkey the deceased and Esther Romi

(Testimony of Chelbom Ameri.)

lived together as husband and wife. That deceased was a laboring man in the old country. Did pick and shovel work and other work like that.

That witness never got any letters from Mrs. Penso or from the boy.

That deceased and Mrs. Penso were married at Dardenelles, Turkey. That they had a man marry them—a churchman. That they were married in the Jewish religion, at deceased's house. That he did not know what month they were married in. That after they were married they lived together and among their friends and acquaintances were known as man and wife and went from place to place as man and wife. They told people they were husband and wife and everybody knew they were husband and wife. [22]

On cross-examination by defendant's counsel witness testified that he had lived at Seattle five years, never lived at Hoquiam. That Penso had been in this country five or six years before his death.

That witness had never been back to Turkey or the old country since coming to this *county*. That deceased never went back to Turkey after he came to this country.

[Testimony of Leon Benezra, Recalled, for Plaintiff.]

LEON BENEZRA being recalled as witness for plaintiff testified as follows:

That he had written to Esther Romi Penso about every month and sometimes twice a month. That he

(Testimony of Leon Benezra.)

usually sent every month money to her. He sent this money in deceased's name. That witness made the applications. That deceased sometimes sent to Esther Romi Penso twenty-five dollars, sometimes thirty dollars, sometimes fifty dollars, sometimes fifteen dollars per month. That this money was sent by money order, postoffice or bank draft. Once $50 was sent her through a man who lived at Hoquiam whom deceased knew. That deceased sent this money throughout a period of four years or something like that. That deceased sent her altogether nearly two thousand dollars in four years. Might be more, witness could not state exactly.

That witness had received no letters from Mrs. Penso since Penso's death. She sent her letters to Penso's brother, in New York.

That at one time he was connected with the Turkish Consulate in Greece. That deceased was of Turk nationality. That he never became a citizen of the United States. That Mrs. Penso lived, during the years referred to and up to the last time he [23] heard from her, and still lived, in Dardanelles, Turkey.

On cross-examination by defendant's counsel, the witness testified that Mrs. Penso's son lived with Mrs. Penso, his mother, and the son had never been in this country. That witness used to work in a sawmill at Hoquiam for the Hoquiam Lumber & Shingle Co. and the Coats Shingle Co. That he roomed with the deceased all the time. That deceased was about 40 years of age. That he could not write

(Testimony of Leon Benezra.)

at all. That he wrote all of decease'd letters. That he read all of deceased's letters and all of his correspondence.

Testimony of J. A. Lewis, on Behalf of Plaintiff.]

By stipulation of counsel an affidavit of one J. A. Lewis was read in behalf of plaintiff in lieu of a deposition, as the testimony of Mr. Lewis. This was as follows:

"J. A. LEWIS, being first duly sworn, upon oath, deposes and says: That he is the manager of the corporation known as the Coats Shingle Company, that at the time of his death Haim Penso was employed by the company at a daily wage of $2.50 per day; that he had been steadily employed by the company as block piler for a period from May 14, 1912, to November 4, 1913, at which time he was killed. That of that time he worked 64 days at $2.25 per day and worked 385 days at $2.50 per day; and further affiant sayeth not." [24]

Testimony of John G. Girard, Witness for Plaintiff.

Direct Examination.

Witness lived at 410 Monroe street, Hoquiam. Had lived there 29 years, was 30 years of age. That for seven years from 1906 to 1913, he had worked at the Hoquiam Lumber and Box factory in Hoquiam. *Last* for last four years he was there he had charge of the box factory.

That he lived in the north end of Hoquiam on the other side of the river from the Box Company's plant, it being on the east side.

(Testimony of John G. Girard.)

That the National Lumber & Box Co. was located on the east side of the river. That the railroad went right through the yard and a part of the plant was located on one side of the railroad track and part on the other. That he crossed the bridge there twice a day for nearly ten years and observed others crossing the same bridge. That employees used to cross the bridge going to work in the morning and returning home. That the employees of the plant referred to habitually crossed the bridge. That he had seen about 100 persons preparing to cross the bridge one time. That he had also seen that many crossing the bridge at a time. That he had been behind fifty himself, waiting his turn, and that this continued up to the time that he quit the National. Most anybody crossed during the last five years that witness was there. People had crossed it who were not employees that he knew of. People looking for jobs had crossed the bridge.

That he knew where the Eureka Lumber & Shingle Co. plant was located. That the employees of this company used the bridge. That he knew where the Posey Manufacturing Co. was located. That he did not know anything particular about the employees there. [25]

That he knew where the Coats Shingle Company's plant was located and that several of the employees of this company crossed the bridge.

That at one time witness was employed by the Boice Lumber Co. That three of the employees used the bridge. That when the bicycle of witness was broken

(Testimony of John G. Girard.)

he did. Witness was then shown Plaintiff's Exhibit 2, and pointed out to the jury where the bridge was located on the map and where the National Lumber & Box Company was located and stated that the box company was on one side and the sawmill was on the other side. That he worked in the box factory on the northerly side of the railroad. Also testified that he lived on the opposite side of the river from where he worked and pointed out on the map where he lived.

Witness then pointed out on the map where the Eureka Lumber Company's plant was located, the Coats plant, the Boice Lumber Company and the Posey Manufacturing Co.

That referring to persons not employees of these plants, he had seen people using the bridge looking for work and going home again if they did not find it, several of them.

That on the west side of the bridge, people would come from the Northwest Lumber Company's yards and they would strike a four-board walk about 80 feet long and then would come to a pair of stairs which would take you right up to the bridge. That you had a seven-foot walk up there and you were right on the bridge then. That the bridge was tinned for traffic. On the other end of the bridge, for the convenience of passengers there were planks on each side and steps on each side going down into the National yards.

That the main part of the town was on the west side of the [26] *west side of the* river, but there

(Testimony of John G. Girard.)

were lots of people living on the east side of the river. That with reference to people living on the east side of the river and going to work at theNorthwestern mill across the bridge, there were several that crossed the bridge going to work at the Northwestern Mill and the Grays Harbor Mill too.

That women and children crossed the old bridge in 1906 or 1907, and that was about the only time that they crossed. That he meant by the old bridge a wooden bridge built there before the steel bridge was. That the steel bridge was built on practically the same site as the wooden bridge and was used by the same company. That there was no difference in the use of the old bridge and the steel bridge so far as people travelling back and forth were concerned.

That he went to work in the morning at 7 o'clock, leaving his home at half past six. That the bridge was closed pretty nearly every morning, excepting when there was a boat going through. That for the first period he worked there the bridge was closed for the men, but later on a log train was in the habit of coming through there about between half past six and seven, then it was always closed. That in the evening he crossed the bridge just after six.

That the bridge was closed a good deal of the time, so that traffic could pas*t* across it and it was closed a good deal of the time whether trains were passing back and forth or not. That he was never late at work unless the bridge detained him.

That he might have been delayed fifteen or twenty

(Testimony of John G. Girard.)

times during the years he worked there. That while witness was passing that way over to his work he would judge that out of about 600 working at the plant there must have been about 300 of [27] them crossed the bridge. That the bridge was sometimes open for the purpose of boats passing through. That if it was open for boats passing through it would then be closed for men to pass over if there were any men waiting.

The witness testified that the walk which had been built along the side of the bridge for foot traffic had been in its present condition for a great many years. That it was built before he went to Hoquiam. The walk was four boards wide, between seven or eight feet long and the steps were about 12 or 14 feet high and at the tops of the rails of the bridge there was a platform about eight feet wide and about seven feet long. That the walk with reference to the railroad track was seven or eight feet below the track.

That at the end people got up to the railroad track by the steps. That there were between ten and thirteen steps, somewhere along there. That the platform was on the bridge at a point where people reached the railroad track from the steps. That it was about eight feet long and seven feet wide and it runs to the first left-hand side rail. That a picture shown witness by plaintiff's counsel fairly represented the condition it was in in November, 1913, at the time the deceased was killed. The photograph (a picture) was admitted in evidence and marked Plaintiff's Exhibit No. 5.

(Testimony of John G. Girard.)

That he did not know of any change in the platform since November, 1913. There might have been some new boards put on it. There was none when he was there the other day. That the photograph handed him showed the bridge was open for boats to pass. The photograph was then offered in evidence and marked Plaintiff's Exhibit No. 6.

Witness was then handed another photograph and stated that it represented the west end of the bridge. The end the platform [28] was on, first existed in November, 1913. That he did not think there were any changes since then. The photograph was admitted in evidence and marked Plaintiff's Exhibit No. 7.

That as to the condition of the railroad track lead-up to the bridge that he would judge up and towards the depot from the bridge to be between 250 and 300 feet; there was a little curve. That the curve would not take up so very much of the track. That a train approaching from the depot to the bridge would not approach it on a straight line. There was a kind of a double curve in the track when it goes down beyond there.

Witness was then handed a photograph and stated that it fairly represented the condition of the track in the vicinity of the bridge to the westerly and leading up to the bridge from the Hoquiam depot as it existed in November, 1913, and that the curve he referred to was shown on this picture. That the track had always been in the condition it was shown on the *photograph fairly* represented the track. The

(Testimony of John G. Girard.)
photograph was then admitted in evidence and marked Plaintiff's Exhibit No. 8.

That there was a grade going up to the bridge at the westerly end of the bridge. That a person could stand on the bridge and at about 700 feet could see the rays of a light from the headlight upon a locomotive; he could not get a definite view of it until it was around the curve. That when he referred to the rays of light he referred to the rays on the engine. That a person would first get a view of the headlight itself about 300 feet from the westerly end of the bridge. That the curve commenced 250 or 300 feet from the westerly end. That he had testified that men who worked in the Northwestern on the west side of the bridge travelled over the bridge to the east side if they lived there. [29]

The witness was then shown Plaintiff's Exhibit No. 5 and indicated where he had seen people standing on the board-walk and on the steps and platform and way back on the platform had stood in line waiting to get across while some boat was going through. That he had seen fifty or more people there at a time under these conditions. After the boat would pass through, if the bridge was ready to be closed, it would be closed for the people to cross.

On cross-examination witness was shown by defendant's counsel a photograph purporting to show the westerly approach of the bridge. Witness stated that it did show the westerly approach and that the curve he had testified about was upon the photograph. That the Northwestern Lumber Co. had property on

(Testimony of John G. Girard.)

either side of the track. That the National Lumber & Box Co. and the other companies he had mentioned were on the east side of the bridge. That he did not know whether (No Trespass) sign that showed on the photograph had been there. That he had never been out that way. That the photograph was a fair representation of the condition which it purported to show. Defendant then offered this photograph in evidence. It was admitted and marked Defendant's Exhibit "A."

Witness was then shown another photograph by defendant's counsel and stated that it showed the westerly approach near the bridge, showing the straight track about 300 feet which had been mentioned by witness and stated that the car shown on the photograph, standing on the track, was standing at about the curve and about 300 feet from the westerly end of the bridge. That from the car to the westerly end of the draw would be about 300 feet. That the photograph was a good [30] picture of what it intended to show. Whereupon defendant's counsel offered the photograph in evidence and it was admitted and marked Defendant's Exhibit "B."

Defendant's counsel then presented to the witness another photograph and the witness stated that it showed the whole bridge and the straight-away referred to at the west end of the bridge, the walk to the house in which the bridge-tender operated. Defendant's counsel then offered this photograph in evidence and it was admitted in evidence and marked Defendant's Exhibit "C."

(Testimony of John G. Girard.)

Defendant's counsel then showed the witness another photograph and witness stated that it showed the west approach, looking through the bridge to the westerly platform. Defendant's counsel then offered this photograph in evidence and it was admitted and marked Defendant's Exhibit "D."

Witness testified that the westerly approach of the bridge was for some distance on piling or trestle and was elevated. That there was a little grade in it. That the approach to the bridge from the easterly side was also along trestle, quite high. That the trestle on the east side where it goes up to the easterly side of the span of the draw was about twelve or fourteen feet high from the ground, that on the westerly side it was more than that. That the length of the trestle work on the easterly side of the river, where it goes down, and before the track comes down to the ground the witness would judge was about 2½ blocks, and on the westerly side 450 feet. That it was 8 or 10 blocks from Hoquiam station to the westerly end of the bridge. That it was over 2,000 feet anyway. That it would take a man twelve to fifteen minutes to walk from the westerly end of the bridge to the Coats Mill where the decedent was working. The distance would be about a [31] quarter of a mile. That the draw span of the bridge was about 300 feet in length. That several boats would go through the draw during twenty-four hours in each day, in fact a good many boats. That it was an important river. That there were some big sawmills and other manufacturing plants up the Hoquiam River from where

(Testimony of John G. Girard.)

the bridge was. That the bridge was near the mouth of the Hoquiam River and Grays Harbor, near the the junction of these, very close to them, and that boats in order to get through to big plants would have to go through the draw. That all of the trains that went into and out of Hoquiam must go over this bridge and did so at the time of the injury. That the Northern Pacific, Oregon-Washington and Milwaukee all operated all of their trains over the bridge. That this applied to passenger and freight, switch-engines and everything. There was no other way for a train to cross the Hoquiam River, excepting over this bridge. The bridge was used a great deal and very extensively every day. That there would be a considerable number of trains passing over the bridge each day. That if a man were 300 feet away on the track or the trestle east of the easterly end of the bridge and if a car, at night, approaching the westerly end of the bridge when it was 300 feet away or when it was on the straight track a man about 300 or 500 feet away on the east side could see the headlight right through the bridge. That a man could not see the headlight propably if it were a quarter of a mile. That there was a curve that prevented. That he could not tell how far this curve was from the east end of the bridge and then stated that it was about 500 feet.

That a man standing on the track or trestle east of the bridge could see the headlight and the approaching train when [32] it was about 300 feet west of the westerly approach. Could see the head-

(Testimony of John G. Girard.)
light if it was a clear day or a clear night, he could not see it if it was very dark. That the headlight could not be seen 1,000 feet, if it was raining and pretty dark and the wind blowing. That he thought it could be seen about 500 or 600 feet. That the headlight could be seen twice the length of the bridge, in any event. That there was a platform on the bridge at the left-hand side of the track, and there was a kind of smaller platform on the west side, that is three or four boards. That about the middle of the bridge there was a platform with a little house upon it on the left-hand side and on the extreme easterly end of the bridge there was another platform and stairs descending, very similar to the one shown in the photograph, exhibit "D" on the westerly side.

Witness was then shown another photograph showing the westerly approach to the bridge and *and* reverse curve and stated that this was a photograph so showing, and that this picture showed the reverse curve leading to the bridge. Defendant's counsel then offered the same in evidence and it was admitted in evidence and marked Defendant's Exhibit "E."

On redirect examination, on behalf of plaintiff, witness testified that in passing over the bridge from the National mill that he never traveled on the trestle, that he got upon the bridge by way of the steps. That there used to be a driveway from the National Box Company's plant, underneath the trestle and across the street—Riverside Avenue, from one side of the plant to the other. That the com-

(Testimony of John G. Girard.)

pany dumped their logs, and took out the passageway and put in a little platform about three boards wide. That there was a footpath of about twelve feet of plank roadway, and then there was [33] a little trestle about 20 feet long. That there was a foot passageway from one portion of the mill to the other, located on Riverside street.

That at the other end, near the Northwestern plant there was a roadway to the shingle mill. That they drove teams through there, underneath the trestle.

Witness testified that from the box factory those who would cross the bridge would go across a space, down over a hump, and some would go over the trestle, while others from the sawmill and other places would go down (indicating) and go down the steps and across the bridge. That some of those in the west end of the town went down the trestle, but very few of them. That a majority of persons crossing the bridge went down the steps. That the notice referred to by defendant's counsel on cross-examination was about 500 feet from the east end of the of the trestle—from the bridge to the end of the trestle. That he meant by the bridge where the draw was. That there was no such notice on the bridge itself. That he did not know of any notice on the westerly end of the bridge. That during the seven years he was there he never saw any notice at all until he saw the photograph referred to. That from the foot of the steps, along the walk to the place where the Northwestern roadway runs under the

(Testimony of John G. Girard.)

bridge was about 80 feet. That at the other end of the bridge the National's footpath, which was formerly a roadway passed under the bridge itself.

In 1906, when there was a wooden bridge there the witness and others had a pass. That they used these passes for ten or twelve months and paid 50 cents per month for each pass. Then they were given a button. This did not continue many months. Then after that there were no objections to persons using the [34] track at all. That the use of the buttons was discontinued in about 1908. That since 1908, there had been no restrictions on anyone passing back and forth across the bridge, so far as he knew. Sometimes the bridge-tender would be pretty sore and would stop them for a couple of days and then let them go across again. That his objections consisted of being just sore.

That the last time he knew of anyone being stopped with reference to crossing back and forth across the bridge was one time when they did not have a button. That he used to live on the west side and that his brother was living on the east side and his brother was going to come over to have dinner with him. This was in 1907.

On recross-examination the witness testified that he did not know whether the railroad company gave out any buttons. That they were given out at the National Office. That he did not know who paid the 50 cents out of the workmen's wages.

Witness was then shown a photograph by defendant's counsel and testified that it showed the east-

(Testimony of John G. Girard.)

erly approach to the bridge, the shipping sheds, and the bridge in the distance. That the witness saw the "No Trespass" sign on the photograph as shown him but that he never seen this "No Trespass" sign before. That this notice might have been there a long time, but he never had any occasion to go up that way. Then counsel for defendant offered in evidence the photograph *referred.* Mr. Morgan, of counsel for plaintiff, was then permitted to examine the witness and the witness stated that he had never seen the notice and he never heard others say whether there was a notice there or not. That this notice had not come under his observation in November, 1913. He had never seen it. It might have been there. Thereupon the photograph was admitted in evidence and marked Defendant's Exhibit "F." [35]

Testimony of Theo. Balabanas, Witness for Plaintiff.

THEO. BALABANAS, a witness for plaintiff, being sworn, testified: That he knew the deceased in his lifetime. Deceased was killed in November, 1913. Just prior to being killed he was working at the Coats Shingle Mill factory. That he and deceased left the factory on the day deceased was killed at a quarter to six in the afternoon. Deceased and witness had been working at this mill for about a year. Witness had known deceased for four years. First met him at Hoquiam. When witness and deceased were working at the shingle mill deceased was working steadily. Deceased and witness were working at moving blocks from the chains and putting them up

(Testimony of Theo. Balabanas.)
on the tables. They were working on the same job, in the same mill. That witness had crossed the railroad bridge that goes across the Hoquiam River many times. While working for the Coats Shingle Mill he crossed the bridge every night but not in the morning. That witness lived on 11th street towards town. He and deceased, on the evening of the accident, left the mill at a quarter to six and were on the bridge at six o'clock. It took fifteen minutes to walk from the mill to the bridge. It was a fairly dark night and was raining a little. Deceased was hurt on the bridge. Knocked down by the car. He was struck and then his body went down and witness did not see his body.

Witness and deceased was going towards the bridge when deceased was struck by the car, and towards town. It was a gasoline car which goes to Montesano that struck him. When crossing the bridge deceased and witness were walking together. At the time deceased was struck by the car witness stopped to roll a cigarette and Penso went on ahead, They were in the [36] middle of the bridge when the car was approaching. That when walking across the bridge there were planks that they walked on, and were going towards Hoquiam. That witness did not know when the car was coming, but he and deceased were passing on the bridge every night. They were crossing the bridge every night. Witness did not know whether the car would cross the bridge at that time or not. The witness did not hear any whistle from the car. Did not hear any

(Testimony of Theo. Balabanas.)

bell ringing. That the way he knew the car was coming was when he stopped to roll his cigarette and deceased passed a few steps ahead, then the car passed right ahead. That when witness saw the car he started to walk and when deceased was struck witness went over and dropped on to an iron post on the bridge. That he got over to the iron post by stepping on the rail and then putting his hand upon the post. Witness then pointed out the post on Plaintiff's Exhibit 7, which he got hold of, saying it was the post right in the middle of the bridge. Witness then pointed out and marked the post on Plaintiff's Exhibit 7, which he got hold of, pointing to the upright post nearest the west end of the bridge on the up-river side. That as the witness stopped deceased was right on the step, and deceased was struck by the car and then the passengers and some of the brakemen came down with ladders and were looking for the body and they only found his dinner pail.

That witness stepped over and put his hand around the post and stopped there. Asked how soon he did that after he saw the light on the car. he answered it was about 24 feet. That after the witness saw the light of the car and before he moved to the post he put his arms around. Witness had walked four or five feet after he saw the car coming, then he put his hands around the post and stayed there, and then came down again. When the deceased was struck witness dropped the post. [37]

That there was no place deceased could have got-

(Testimony of Theo. Balabanas.)

ten off the bridge, excepting the platform that deceased was going towards, after the car was seen. That there was no other room or platform, excepting the stairs. That Penso was killed, but that he did not see him. After witness saw the light of the car deceased was running to cross the steps and as he tried to cross the steps deceased was knocked down by the car. Deceased was trying to put his feet on the stairs when he was struck by the car. He meant by the stairs, on the platform. Right on the platform. That one of the feet of deceased was on the rail and one on the platform. That after witness saw the light of the car there was no place deceased could have gotten to as a place of safety, excepting the platform towards which he was running. That as to why there was not any other place he did not know. There were only a few boards inside the rails and no other room at all. That deceased could not have stepped off on the side like witness did because deceased was ahead, right close to the stairs. That there was no place on the side of the bridge where deceased could have got hold of before getting to the platform. That he did not know how many minutes it was after witness saw the light on the car until deceased was struck by the car, but that he did know that deceased was running to get to a place of safety.

On cross-examination by defendant's counsel the same witness testified: That he and deceased had been working at the Coats Mill for a year and that he and deceased, every night, during that time crossed over the bridge. That in going to work in

(Testimony of Theo. Balabanas.)

the morning the witness crossed the wagon bridge, which was across the Hoquiam River, on the electric car. That electric cars [38] crossed over the regular wagon bridge. That witness, when crossing the railroad bridge in the evenings did not, before this time, see any such car and only saw it at the depot sometimes, and only on holidays and Sundays. That he did not know what time the car left the depot for Montesano. That on the night of the accident he and deceased quit work at a quarter to six, the other nights they went home at ten minutes to six and stated that sometimes they quit work at ten minutes to six and sometimes at a quarter to six, but the night deceased was struck they left at a quarter to six. That witness did not know if the time the motor-car left Hoquiam station was six o'clock and had been such for a long time. That he had met this car sometimes on Sundays and had seen it at the depot only on Sundays. That he and deceased always went home, going from work. that nobody else went with them. That deceased smoked sometimes, but was not smoking that night after the two left the mill. That witness lived on 11th street, and deceased lived on the other side of the police station.

On redirect examination, for plaintiff, witness testified that deceased was in good health and was workings during *during* the year previous to his death.

Testimony of Christ Zurbas, a Witness for Plaintiff.

CHRIST ZURBAS, called as a witness for plaintiff, testified as follows: That he was on the bridge

(Testimony of Christ Zurbas.)

the night deceased was killed. Had been working that day at the National. Prior to this had been working at the National for four months and had crossed the bridge every night. It was raining and windy that night. Deceased was killed about 6 o'clock. There were other persons on the bridge at that time. 15, 20 or 25, he could not tell the actual number. That witness was [39] on the National Lumber & Box Company's side, or the town side of the bridge at the time Penso was killed. That witness was in the middle of the bridge. That he had seen these gas cars a couple of times before while on the bridge. That many men from the other mills were in the habit of crossing the bridge after they quit work at night. That the men who were on the bridge that night did not do anything in the way of signalling to the car.

Testimony of John G. Girard, Witness for Plaintiff.

JOHN G. GIRARD, recalled on behalf of plaintiff, testified, that he had seen the gas car referred to. That when in operation it was very quiet. That he would say it went very quiet unless they were blowing the whistle or ringing the bell it would sneak right up to a man before he knew it, in his estimation of things. Compared with a street-car or trolley car he would judge it would make about the same amount of noise. Witness' attention was called to Defendant's Exhibit "B" and stated that he recognized the photograph of defendant's gas car. That he could not tell whether the headlight on the gas car was a standard headlight such as are used on loco-

(Testimony of John G. Girard.)

motives, or whether it was a special sort of headlight. That the headlight on the gas car was located in the middle of the front of the car, similar to a street car. That he did not know whether it was an electric light or a gas light. That he never paid any attention to this headlight. Never saw it lit.

On cross-examination on behalf of defendant, witness testified that he recognized the photograph shown him as looking like the car in question and he recognized that it was apparently on the westerly end of the bridge. Probably not entirely on the [40] bridge, about half and half. The photograph was then offered in evidence by defendant to show the height of the light. It was admitted in evidence, marked Defendant's Exhibit "G."

That the car was considerably larger than an ordinary street-car, and heavier. It was a steel car. That witness could not tell whether it would make a good deal of noise going across the bridge but that he thought that in crossing a bridge any kind of a car could make considerable noise.

Leon Benezra, Witness for Plaintiff, Recalled.

LEON BENEZRA, being recalled for plaintiff, testified that deceased could not read his own language, it was hard for him to learn. That he could not read English. That after deceased was killed witness spent over $20 to find the body. That he used to see in the papers where they could find bodies and that the fourth time he went to the undertakers he identified the shoes and clothing of the deceased and then

wired deceased's brother in New York. That the body was at the undertakers. That he identified the body by the shoes. He used to wear a pair of Turkish boots from the old country, and had worn them about four years. That witness found the Turkish boots referred to.

Plaintiff then rested, with the exception that the right was reserved to offer in evidence the tables showing the expectancy of life of the deceased. There was no objection to this.

Defendant then moved for a nonsuit on the ground that the evidence was insufficient to show negligence on the part of the defendant company, and also upon the ground that the evidence showed that the deceased was guilty of contributory negligence. Also that it was not shown that deceased and Esther Romi Penso were husband and wife or that either of the plaintiffs [41] were dependent upon the deceased for support. The motion was denied by the Court and an exception allowed defendant.

Counsel for plaintiff then produced the American Experience Table of Mortality, for the purpose of showing that the expectancy of life of deceased at the time of his death, at which time counsel stated he was forty-eight years old, was 28.18 years and that the expectancy of life of the widow, 35 years old, would be 31.78 years. Counsel for defendant stipulated that the tables would show as counsel had stated, but did not admit the materiality of the testimony, and objected to it on the ground that it was incompetent, irrelevant and immaterial. The objection was overruled and an exception was allowed.

Testimony of J. Hendricks, for Defendant.

J. HENDRICKS was called as witness on behalf of defendant. Age 32 years. That he was employed as engineer by the defendant company at Hoquiam, Aberdeen, and in that section. He remembered the circumstances of the alleged killing of the deceased, which had been referred to in the trial. That on November 4, 1913, he was the engineer in charge of the gasoline car. He had been operating this car about ten days, over this bridge and along the thoroughfare there. That he had run trains over the bridge before, and had been over this same bridge a good many times before with trains. These were locomotive trains. That during the ten days before the accident he had operated the car every day across the bridge, crossing the bridge four times a day, two going and two back. The schedule time of the car was 6 o'clock, leaving the Hoquiam station and was about three minutes run from there to the bridge and it took about one minute to cross the bridge and on the evening of the 4th of November, the time of the accident, the car left Hoquiam [42] at 6 o'clock. That when the car was just ready to leave Hoquiam he started the bell ringing, before he started the engine or started the train, at the time the car left Hoquiam, at 6 o'clock on the evening of November 4th. The bell was an automatic air bell, self-ringer, started by a little valve in the cab. You would open the valve and the air flows through and operates the bell from the top of the cab. That he started this bell in operation before

(Testimony of J. Hendricks.)

leaving Hoquiam. That it continued to ring from that time until the car stopped after the accident occurred. That the bell could be heard ringing two blocks away easily, about 1,000 to 1,200 feet. That the ringing was continuous. That there was no way to stop the bell, except by shutting off the valve by the engineer. That it was his custom and habit during the ten days he was operating the car to have the bell ringing when crossing the bridge, and always did so. The ringing of the bell was intended for a warning for everyone that was liable to be in front of or in the way. That after leaving Hoquiam at 6 o'clock on that evening he sounded the whistle of the engine. That it was necessary to call for the semaphores, about half a block from the bridge, and approach the semaphore calling for it, giving one long blast of the whistle. The semaphore man, who was situated in the center of the bridge, would return the signal, which would be a green or red light. A red light was a stop signal and a green light was to proceed. Upon receiving these signals the engineer would answer by two short blasts of the whistle, which signified that he had accepted the bridge That this was the regulation and rules of the railroad company and the practice of that company and all other companies using the bridge. That he blew the two whistles on the evening of the accident. That after he blew [43] the first whistle he got the green light in return, which meant to proceed, then he blew two short whistles after receiving the green light to signify that he had accepted the

(Testimony of J. Hendricks.)

bridge and was proceeding. The object of the semaphore is to control trains. It is a board straight up and a board with an arm standing out with a light on the top of it. If the arm stands straight out it is a danger signal. When the signal man drops that signal it signifies clear; it will also show a light, red for danger, green for clear. The object of having the semaphore was for the operation of the draw; it being a draw bridge. It was necessary to have a signal before trains could use the bridge. Within fifteen feet of the bridge there was a derail. If it was undertaken to operate on the track without getting these signals the engine or train would be liable to run over the derail and go into the river. The whistle could be heard a quarter of a mile away; and in going into Hoquiam he would blow the whistle over a quarter of a mile away for the bridge. That there was an upgrade of about four or five per cent going up the trestle or approaches to the bridge. At six o'clock in the evening he thought he always met somebody along on the bridge. Sometimes people would be walking across and would get into the clear and again they would be in the clear. That there would never be more than two or three on the bridge at a time but at the platform at the end of the bridge he had seen it loaded with persons, ready to enter the bridge as soon as he got off.

That when he got up on the bridge on the night of the accident his engine was traveling about six miles an hour. That he knew the speed because it was a geared car. That it had to be operated about ten

(Testimony of J. Hendricks.)

miles before it became necessary to change the gears and that he had not changed the gears. The [44] engine was moving at the same speed as it approached the bridge from Hoquiam. There was a headlight on the motor-car, and it was lit at the time of the accident and before. That he lit it at Montesano before starting out *and was* burning at all times from that on. That on the evening of the accident he observed one man on the bridge approaching in the ordinary way. When he first saw him he was distant about 300 feet and was walking towards the car and was in the center of the track. That there was a tin covering between the tracks. He did not know the man he saw. Did not know deceased during his lifetime. The man was walking up and aways toward the motor-car and he stepped off to one side and that all witness saw was that he turned around and jumped in front as if he was going to make a getaway or something and witness immediately applied the emergency air and stopped and did not see anything more of the man. That he applied the emergency air as soon as the man he saw started back away from where he was and that he stopped the car. He did not see anybody hit and did not feel any impact. The bell was ringing when the car stopped. That he did not discover anybody else on the track or bridge until the got out of the motor-car and was on the track. That he did not see any dead body or helpless body or anyone in a crippled condition. That all he knew was that somebody found a dinner pail. That he had no knowledge of what became of

(Testimony of J. Hendricks.)

the man he referred to as stepping off the side of the bridge in front of the car. That he stopped his car as soon as he could after he discovered that the man was attempting to move from his place. As quick as he saw the man moving he threw on all of the air, that is the emergency brake and stopped the car. When he saw the man moving it appeared as if he was going toward a pillar—which [45] witness supposed he was going to lean up against. By pillar he meant one of the uprights of the bridge. That a man could lean against an upright with safety, without the car hitting him. That he supposed the man was safe when he was at this pillar and had no reason to think he was liable to be hit. That this was a common occurrence there on the bridge when people were crossing it. That people were seen there every once in awhile. That the man made some motions from this upright and when he did the witness stopped the car just as soon as he could.

Witness then testified that the bridge is the part that swings. The draw. The other part, before you get to the bridge is trestle work—the bridge is what swings around or the center of it. That he stopped the car between ten and fifteen feet. It had been raining hard and was windy and dark.

On cross-examination by plaintiff's counsel the witness testified.

That he lived at Seattle about 25 years, occupation locomotive engineer, had been with the defendant four years and previous to that had been with the

(Testimony of J. Hendricks.)

N. P. for ten years. That he never ran for the N. P. on the Grays Harbor branch prior to the accident. That for the N. P. he had run between Bellingham, Seattle and Sedro Wooley. By occupation he was an engineer of steam locomotives. That at the time of the accident he had been operating gas cars ten days. That the gas car referred to was propelled by a gasoline engine located in the car itself, and the operation of the car was altogether different from the operation of a steam locomotive. That this car could be operated at a very high speed—45 or 50 miles per hour. The speed could be regulated. That it differed from the operation of a steam train in that it picks up and gathers speed very quickly and [46] could be stopped much more quickly than the ordinary steam train. That his experience in the operation of gasoline cars before the ten days period which he had been speaking of was this: That he went to North Yakima and studied the car eighteen days at the shop, and then he operated the car for twenty days in practice. Then he took the car himself. That prior to this time he had operated a steam locomotive for the defendant across this bridge. That since the time of the accident he had been operating a locomotive for defendant.

That the semaphore was there before the witness came there. The semaphore was in operation all the time he was there and before. That he could not be mistaken about it. That the bell on the car was operated automatically by air pressure. The air

(Testimony of J. Hendricks.)

was supplied by and air-pump and air-brake. That the bell never got out of order in such a way that it stopped ringing.

That on a locomotive the bell could be rung by a rope or by air. The engineer would operate it by air and the fireman by rope; but the gasoline car is fixed by the engineer alone. He operated it by air. That is was not necessary to have a rope; that it was an air valve. *That the* ordinary whistle such as was used on street-cars, but much larger than on street-cars. That it was operated from the same tank that the bell was operated from.

That the headlight was lighted by acetylene gas. That it was a standard light. All the engines formerly had acetylene gas before the State required electric lights. That it was not such a headlight as was used on steam locomotives.

That Defendant's Exhibit "G" did not show the car referred to. The number of the car was 607. That was not the car shown in the picture. That the one in the photograph, however, was one [47] exactly like it. That it was its mate but it was not the same car. It was just the same as the car in the photograph. You could not tell them apart, only the number was different. That the headlight on 607 was the same as the one shown on the photograph, located in the same place.

That the gas-car had a cowcatcher on it similar to that on a steam locomotive and that the headlight was located to the center of the car about half way up

(Testimony of J. Hendricks.)

the height of the car. That there was no difference at all, so far as witness could see, between this headlight and that used upon the ordinary steam locomotive. That it was not as strong as an electric light but it was as strong as was ever used and a lot stronger than was used in the yards or any place else. That the acetylene light was not a varying light, but was a steady light. That the whistle was located right opposite the bell.

Witness marked on Defendant's Exhibit "G" a letter A at the point which he indicated the whistle was. That the whistle worked upon the same principle as a steam whistle on an ordinary locomotive, but was not quite so large. That you could not hear an air whistle like a big locomotive steam whistle. That steam whistles varied considerably. That he had used *whistle* that shrieked. That the ordinary air whistle is much smaller than the ordinary locomotive whistle, but he did not know whether it was any higher pitched or not.

That he thought the accident occurred on November 5th, it was somewhere around there. That he made a record of it at the time. The night was very dark and it was raining and it was windy, and blowing strong. Witness was then shown Defendant's Exhibit "E" and stated that he recognized a portion of it as being the westerly approach to the Hoquiam River bridge. That leading up from the depot towards the bridge from the west there [48] was quite a long straight stretch of track approaching the bridge, and as the curve in the track was ap-

(Testimony of J. Hendricks.)

proached the headlight would be thrown away from the direction of the bridge. That it was a reverse curve he referred to. That in the course of time the engine would come back on entering the straight stretch of track and the headlight would throw on the bridge. That the photograph shown witness fairly represented the reverse curve which he had spoken of, and the straight stretch of track was not shown in the photograph. That it was beind the point where the picture was evidently taken.

Coming up with a gas-car from the Hoquiam depot along the straight stretch of track the reflection of the gas-light would not show until it struck the curve. That is would show in the center of the track until it reached the curve. That the center of the track was not in line with the bridge on the straight track. That when the engine would reach the curve the headlight would throw a reflection to the west of the bridge until the curve was passed over. Just as soon as the engine entered the straight track again it would show on the bridge. It was 290 or 300 feet from the end of the curve to the bridge. That this acetylene headlight on the gas-car would throw a light on to the bridge as soon as that of a steam locomotive would throw it. It would throw the light just as quick as the engine entered the straight track again. That the light of a steam locomotive would not be shown until the straight track was entered.

That on the evening of the accident the witness could see the full length of the bridge when he got

(Testimony of J. Hendricks.)
around the straight part of the track. That he could see from the curve along the straight stretch of track 290 feet to the bridge. That he could see clear through. That he had stated in response to a [49] question previously propounded that there were a good many people accustomed to passing back and forth across the bridge and that he had at a number of times seen a number of people on the bridge when trains had passed over.

That when he first saw men or any man on the bridge of this particular night was when he had just come around the curve and started on the straight piece of track, entered the bridge, he was looking out observing to see if anyone was on the bridge. That was about—he thought right at the point on the curve at the place where the car came on to the straight track so that the headlight showed right on the bridge and this is when he first saw the man far ahead. That he only saw one man. That he was walking towards the car. That he could not say for sure what part of the bridge the man was on at that time, but he thought it was about the center of the bridge. He walked quite a little way towards the car and finally stepped off towards one side and then he bobbed up again and that was the last he saw of him. When the man tried to make his get-away or something like that he was right over to one side of the bridge and about 20 feet from the end. That is the westerly end of the bridge. The witness applied the emergency brake when he saw the man attempting to turn. That is at the time the man tried to make his

(Testimony of J. Hendricks.)

get-away witness applied the emergency brakes. That up to this time the witness had assumed that the man would get away. That if he had stayed where he was he would have been in the clear. He was over to one side. He naturally supposed the man was going to stay there. That they generally did, when they lined up alongside the bridge they stayed there until after the car had passed. That he never saw any other men on that bridge that night until after he stopped the car and got out in [50] front; then there was a great number. He tried to make them understand that he thought somebody was there, but he could not impress it upon them, that they did not sabe—that they just gone down and crawled by the car as if they were a swarm of bees or something. All they did was to try and get away. He tried to impress upon them that some of their people had either fallen over or had been knocked over, he did not know which. That he stopped the car on the bridge and about half of the car was on the bridge. That he did not back the car up. Never moved the car at all until he got ready to proceed. He did not think any of the crew went down to the water's edge. That he stopped the car at once. That he told the conductor right at the time that he saw somebody dodge in front of the car. That he did not think the conductor went down to the water's edge. That the conductor was with him all the time. That somebody picked up a dinner pail. He saw it there. That he did not see the middle man in the front seat in the courtroom on the bridge that night

(Testimony of J. Hendricks.)

and did not see him there at all. Nor did he see him in the center of the track. That he did not see any one there rolling a cigarette.

The last he saw of the man he supposed to have been hit was about where he marked a cross on Defendant's Exhibit "B," but witness stated that this was not definite, that he did not know just where the man was. That he did not see the man supposed to have been ahead run; all he saw was when he turned around he supposed he was going to jump away. Did not know what he was going to do. Did not see him run at any time. After he got off the car he looked around to see if he could see any object lying around. That is he looked around the pillars and beam where he thought the man was. That he did not look down [51] upon the pier itself. That is the concrete pier upon which the bridge rests. The bridge rested upon a concrete pier. That he did not pick up the dinner pail referred to. That he saw it a few feet away from the front end of the car. Did not know who picked it up. It was lying on the bridge at the time he saw it. That he did not know whether he had seen forty or fifty men crossing the bridge at a time, but he had seen over a dozen. They would all be holding on to the piers. Some of them would step down into the clear, some would be on the platform. Others would hang on to the steps. Any place between the guard-rail to the side of the bridge would be in the clear. The car would not cover practically the entire length of the ties; the ties were longer than the ordinary ties on the ground.

(Testimony of J. Hendricks.)

That a person could stand and lean up against an upright. That he could not stand up straight, but could stand on the end of the tie and lean over towards the bridge and the car would pass him. That if a person were opposite the place where one of the upright beams of the bridge was located he could leave his feet on the ties and lean up against the upright beam and be in the clear, otherwise a person would not be in the clear.

On redirect examination by defendant's counsel witness testified: That he was in the employ of defendant company at this time. That he never had any difficulty in the operation of the gasoline car. That there was no other accident, excepting this one, that occurred while he was using the bridge, or that he ever saw.

On recross-examination the witness testified: That he was now operating a steam locomotive. That he operated the gas-car until they pulled it out of service. That another gas-car had been put in its place. That car 607 is now at North Yakima and in service. [52]

Testimony of Louis H. Lucky, Witness for Defendant.

LOUIS H. LUCKY, being sworn as a witness for defendant testified as follows:

Lived at Hoquiam about seven years. 28 years old. Was familiar with the bridge and its approaches. Had been familiar with it about two years or better. That in that time he had passed over it

(Testimony of Louis H. Lucky.)

several times. That he only crossed it twice a day for about a year and a half while he was working for the National Lumber & Box Co. That this was on the east side and he lived on the west side during this time. During these two years lots of people passed over the bridge. That he would judge there was about 100 crossing the bridge every evening. In the morning there would be about half that many. That he did not know whether persons passed over the bridge in the middle of the day. That he knew trains ran over the bridge. That he did not know how frequently, but there must have been four or five trains during the day,—that is passenger trains. That freight trains also passed over the bridge. That he was familiar with the upper construction of the bridge, as to its uprights and so on. That he had met trains in going across the bridge, and he had seen other people on the bridge when trains were passing. That people would get out of the way of the train, down to the side. Some would step to the end of the ties and lean over and some would go down a little father on the steel plates below. That those who would stay on the end of the ties and lean over would lean against the steel part of the bridge, against steel beams or uprights. That these beams or uprights were about twenty-five feet apart, and were on each side of the bridge. That during the time he used the bridge he never saw any accident, excepting this one, or knew of any. That he crossed the bridge the night of the accident at about five minutes [53] after six, he thought, in the evening.

(Testimony of Louis H. Lucky.)

That he was on the east side, going to the west side from where he was working to where he was living. That he saw the gasoline engine going along there that evening at about 6 o'clock. That when he first saw the gasoline car or its headlight, or the rays of the gasoline car, he was in the middle of the track on the bridge. That he was not quite half way over the bridge when he first saw the light. By the bridge he meant the part upon which the draw was. The car at this time was about 300 feet away. Witness at this time was in the center of the track. He saw one man ahead of him. This man was walking in the middle of the track, the car in the meantime was coming towards witness. That he did not see the car knock or hit the man. That he stepped down to clear himself, on the steel work, down opposite the ties. That the car did not pass him. That after he got down on the steel plates he saw the man. That he was alongside the steel when witness saw him—of the steel that goes up and down the bridge. Then the man started to walk right towards the end of the bridge and he got pretty close in touch with the car and after that he did not see him. The man disappeared. The car stopped within a few feet. After the man disappeared witness got off the plate and went up to where the car was. He then looked around a little bit and didn't find anybody or any person crippled; nor did he find any blood. That people gathered there after the car stopped. Quite a number. They evidently came from behind witness and cross the bridge. That he was in a posi-

(Testimony of Louis H. Lucky.)

tion to tell whether the bell was ringing. That it was ringing. That he heard the bell ring just when he approached the bridge, on the other end. The ringing was continuous. That it was still ringing when the car stopped. That he [54] remembered the semaphore board. That the whistle was blown in connection with the semaphore board. That he heard a whistle, more than one. That he was about three hundred feet from the bridge when he heard the whistle. He was not sure whether this was the first whistle or the last whistle. It was a loud whistle, and he judged it could be heard a quarter of a mile or so. Did not know the man on the track ahead of him on the bridge. Did not know the deceased in his lifetime.

Witness was then shown a photograph and asked whether he could tell from that where the plate was that he got on to. The witness stated that he could. That the photograph described the situation so far as the plate was concerned. Showed the uprights he spoke of and how a man could lean up against an upright. Whereupon the photograph was offiered in evidence by defendant and marked Defendant's Exhibit "H."

Witness then stated that the plate was where he was standing, as shown in the photograph. That there were plates of this kind about every 25 feet on the bridge, on both sides. That the gasoline car or engine had been operated over the bridge prior to the accident for sometime. He did not know how long. He would judge it was about four or five

(Testimony of Louis H. Lucky.)

months. He did not know how often gasoline cars operated over this bridge. That he met this car coming across every night, about six o'clock. That he was not in the employ of the defendant company and had not been.

On cross-examination by plaintiff's counsel witness testified.

That he boarded at the Washingtonian Hotel on 10th street. That previous to Tuesday before he was testifying he worked at the Northwest, and had been for about nine months, but was not working there now. That he worked at the National previous [55] to that time. That he had no family. Had boarded at the Washingtonian Hotel about five years. At the time of the accident he was working at the National. That when the car was stopped he went up to it and looked around. He was looking to see if he could find anybody that was hurt. That nothing was said at that time about anyone being hurt. That he was there about five or ten minutes and quite a crowd gathered. That he did not know what was said by the crowd or anyone about anyone being hurt. He heard somebody say that they knocked somebody off or somebody fell off. That was all. Did not see anybody fall or knocked off. That at the middle of the span was the thing the draw rested on, when the draw was open to navigation. That he was not very far west of the span towards the end of the bridge. That he thought he was one cord west of the middle of the bridge.

(Testimony of Louis H. Lucky.)

The witness here, at the request of defendant's counsel, pointed out on Defendant's Exhibit "C" the cord where he stood, making a cross there and lettered it "C." That witness had stated that he saw a man ahead of him before the witness stepped down to the cord, and that while witness was stepping down on to the cord and turning around the man disappeared. That he saw the man after that and that man was at one side and started to go ahead. The shadow interfered with him seeing. He did not know what happened to the man. That as the car approached him the man went into the shadow. That he heard the bell ringing just as he approached the bridge and heard the whistle just before he went on to the bridge. That he meant to tell counsel that after hearing the whistle and the bell ringing that he (witness) went on to the bridge and travelled over half the distance and that this [56] was what he meant to say. That the man he referred to in relation to his movements, when witness first saw the man on the side of the bridge, was when the man started to make for the end of the bridge. That this man was then going in the direction of the car —going towards the car.

Testimony of Wm. Anderson, for Defendant.

WM. ANDERSON, a witness on behalf of defendant, was sworn and testified as follows:

That he was the conductor on the motor car in question and had been such conductor since about the 20th of June of the year of the accident. That

(Testimony of Wm. Anderson.)

this same car had been operating prior to the injury on the run between Montesano and Hoquiam, since about the middle of June of the same year. That this car made two round trips between Montesano and Hoquiam, crossing the bridge four times a day. The schedule time of this car to leave in the evening from the Hoquiam station was six o'clock and this had been the schedule from the June previous. That it would take from three to five minutes for the car to get to the bridge from the Hoquiam station. That he was the conductor and was aboard the car at the time of the accident. That going up to the bridge and the span the car travelled at about seven or eight miles an hour. The bell was ringing. That the rules of the company required that before a car is started the bell must be rung and it was the custom to ring the bell continuously at that time on the car until it got past Posey's Mill, Ontario Avenue, and that this was away east of the bridge. That on the *vening* of the acicdent the bell was started ringing before the car started from the station at Hoquiam and that bell kept ringing continuously from that time until the car was [57] stopped on the bridge. That it was ringing after the car was stopped. That it was an automatic bell and was operated by air by turning a valve and would continue to ring until it was turned off. That it would be started by the engineer. That the whistle blew on this night about the time the car reached the semaphore. That he did not see anybody on the bridge before the car stopped. He

(Testimony of Wm. Anderson.)

was in the back portion of the car or passenger part of the car. The far part of the car contained the engine department where the engineer would be, immediately back of that was the express part and immediately behind the smoking and passenger department. That as to the stopping of the car he felt the air going into the emergency and the car seemed to stop immediately. He went to the front right away to ascertain the cause; that is, the front end of the car. The first man he saw after this was the engineer; he was coming down about the same time. That he looked to see if any person was there who appeared to be injured. That he met people on the bridge—a good many. That he talked with some of them. That he talked with every one he met or saw. That the result was that he could not make anybody understand what he wanted to know. That he asked them if they had seen anybody hit or that was hurt. That the headlight was burning brightly. That the rules of the company with reference to approaching the bridge and to blowing the whistle at the semaphore was that the crew of the car must call for the board and when the board was observed that car must answer. That the call was made first by four whistles and answered by two whistles. In other words four whistles asked the bridge-tender whether or not the car could cross, and two whistles would be when the bridge-tender [58] answered that the car could cross, and the car answered back, meaning all right I am proceeding ahead.

(Testimony of Wm. Anderson.)

On cross-examination by plaintiff's counsel the witness testified:

That he talked with Lucky that night. That he was away back in the back end of the car where the passengers were, taking up fares, and was not in where the motorman was—keeping any lookout on that bridge. That he did not know how many people were on the bridge and did not know anything about it until he got off and went out to the front portion of the car. That it was his business to know about the whistles, and his habit, and the rules of the company. That he had a present recollection that on the particular night four whistles were given for the bridge and that afterwards in response to the signal of the bridge-tender that two whistles were given. That he knew this because it was his business to know it. That there was something on that particular occasion that caused him to fix the circumstance in his mind. That he had crossed over that bridge before when people were on the bridge, many times. That he knew that employees on the east side of the river were in the habit of crossing over the bridge in going to and from their work. That they were working men so far as he knew. That he observed the extent of the headlight on the car, a distance to which an object could be seen by one standing in front of the car in the position of the motorman. That after the car would go into the straightaway—that is on to the straightaway as th*t* car would approach the bridge the rays of the headlight were strong enough so that the motorman could *seen* per-

(Testimony of Wm. Anderson.)

son on the bridge all the way across. [59]

On redirect examination by defendant's counsel the witness testified. That this car could be seen by its headlight on a straight track 1000 feet at least. That the bell on the car was the ordinary regulation bell for the ordinary engine. That the bell could be heard when it was ringing a quarter of a mile at least and the whistle could be heard three-quarters of a mile. It was as loud or louder than a street-car whistle.

On recross-examination by plaintiff's counsel the witness testified:

That he had never given any thought to the matter as to whether at the hour of six o'clock at night he expected to find a large number of men on the bridge as he crossed over on his regular trips and never thought of people being there.

Testimony of E. C. Taylor, on Behalf of Defendant.

E. C. TAYLOR, called and sworn as a witness on behalf of defendant, testified:

That he was one of the operators of the motor-car mentioned. In charge of the baggage and express. That he had been on this car prior to the injury and ever since June of the same year. That the car started on this run between Hoquiam and Montesano about the middle of June of the same year, and it continuously operated on that run up to the time of the accident in November, making two round trips a day. That he remembered the incident of the car approaching the bridge on the night of the accident

(Testimony of E. C. Taylor.)

and the stopping of the car. That the car as it approached the bridge, going from the station to the bridge, he thought was moving at the rate of about six miles an hour. The car was moving at the [60] same rate when it was within fifty or seventy-five feet of the bridge. That when the car left Hoquiam station the bell started ringing and continued to ring until after the accident, and was ringing after the car had stopped. That he heard the whistle of the car before it got to the westerly approach of the bridge. That he heard this before the car struck the curve. That the rules of the defendant company, with reference to calling for the block or semaphore, were four short blasts of the whistle and if the block was given it would be answered by two short blasts of the whistle. The car had just got started on the bridge when it stopped. There was a small door between the baggage and the engine-room, he opened the door and looked inside and saw the engineer getting out. The witness then opened the baggage-car door and looked out on the side. That it was a dark and stormy night, wind blowing, and he could not see anything at all. In the course of two or three minutes, a short time, the engineer came around where the witness could speak to him and witness asked him what was the matter. Witness thought there was something the matter with the car. The engineer said that he believed a fellow had fallen off there. That witness could not get out of the car there because there was no girder to get out at that place, so he stayed in the baggage de-

(Testimony of E. C. Taylor.)

partment and did not see anything at all or anybody. That there was a small platform on the side of the bridge on the westerly end of the draw on the pier. That this platform, with reference to where the car stopped, would be just about the passenger entrance or middle of the car—and that this passenger entrance was about the middle of the car. This platform was on both sides. He thought the car was about 76 feet in length, that [61] after the car was stopped people came up. He tried to talk to one fellow shortly after the car had stopped, who came alongside of the car holding to the girder and that he could not get any reply out of him at all. That was the only person he saw that was close enough to talk to.

On cross-examination by plaintiff's counsel the witness testified:

That he knew that persons were in the habit of crossing the bridge in the night time only from the fact that he had seen people crossing there when the car was going through; that generally when the car crossed the bridge during the evening and on other occasions there would be other people crossing or about to cross the bridge. That he knew there were mill plants being operated on the east side of the river and that the men after leaving their work were in the habit of using the bridge for the purpose of going to the other side of the river where they lived. That the witness could not tell the distance that the train, if it were coming in his direction in the night-

(Testimony of E. C. Taylor.)

time, with the headlight burning, how fast that train was travelling towards him. That a car would look closer than it really was. That witness could tell within several hundred yards of how close the car was toward him as it was moving towards him. That one could tell closer than that, although not as well as he could in the day-time. That when a train comes on to a siding and the switches are all clear so another train can approach the headlights are blinded—indicating that the track is clear. That headlights are not blinded on account of the blindness of the headlight. That it was on account of the fact that it could not be told how far it is away if the car was going towards [62] the person or another train. That he thought the car was travelling at the time of the accident about six miles an hour. That he thought the car could be stopped within a distance of about ten feet at that rate of speed, and from the first time he observed the emergency being put on until the car stopped, it went about ten feet, and he did not think it exceeded that distance.

Testimony of Wm. Anderson, on Behalf of Defendant, Recalled.

Mr. ANDERSON, being recalled on behalf of plaintiff, testified that he thought when the car stopped, with reference to the platform on the westerly end of the bridge, that the center of the bridge *was* where the passengers got off was right on the platform. That he got off right on the platform.

On cross-examination by plaintiff's counsel witness testified.

(Testimony of Wm. Anderson.)

That after the emergency was put on the car was stopped in not over ten feet. That it seemed to witness that it stopped at once, and that the car could be stopped within ten feet at the rate of speed it was going.

Testimony of J. W. Dunn, on Behalf of Defendant.

J. W. DUNN, called and sworn as a witness on behalf of defendant, testified as follows:

That he lived in Montesano and had lived there six years. That he had worked at Hoquiam about two years ago. That he worked at the Northwest and National Mills. That the Northwest was on the west side of the river and the National was immediately across the river on the easterly bank of the river. That he knew of the railroad bridge where the accident occurred and had crossed it. That he worked [63] at the National about two months or a little better and he crossed this bridge every evening going from work. That he generally crossed it about five minues after six. That he met the car referred to during the two months he was working at the places specified on the approach to the bridge. That he met it once just on the part that swings. Just once when it passed him. That he got off right in the middle of the platform. That there was a platform in the middle of the bridge. That he had seen other people crossing the bridge when the motor-car was crossing. That on such occasions some of them would get off on the side and hang on to the posts and some would get down below the ties and on to the steel girders, or whatever they called it

(Testimony of J. W. Dunn.)

there. Different positions along the bridge. That during the two months he had seen many people getting out of the way of cars and doing the things he mentioned at certain times.

Witness was then shown Defendant's Exhibit "H" and asked if he saw in that photograph a man standing on an iron plate. He stated that he did and that in his experience he had seen other people get into the same position. That he had also seen people stand on the ties and lean against the iron posts or iron beams. That a man would be out of danger if he could get down as the man is shown in the photograph, or if he stood on the end of the ties and leaned against the upright pieces. Under these circumstances he would not be in danger of being hit by the car. These places, he should judge, were about five or six feet apart, between the plate pieces.

On cross-examination by plaintiff's counsel witness testified:

That he worked on the side of the river he had been testifying [64] about, right after Thanksgiving. That he worked for the Northwest up until Thanksgiving, right after Thanksgiving he went to work at the National, in the year 1913.

Testimony of A. L. Gabriel, on Behalf of Defendant.

A. L. GABRIEL being called and sworn as a witness on behalf of defendant, testified:

That he resided at Bordeaux. That he resided at Hoquiam about six years, until up to last March. That he worked there for the Hoquiam Sash and

(Testimony of A. L. Gabriel.)

Door Co. and for the National Lumber & Box Co. That he worked for the National during the year 1912, and up until April, 1914. That he had occasionally crossed the bridge referred to. That during the winter, taking a period of a month of thirty days, it was safe to say he had crossed the bridge two weeks out of the month and this would include all of the winter period while he was working at the National, and generally crossed about six o'clock in the evening. That he knew of the motor-car or gas-car operating there from about the middle of June, 1913. That when he would meet the car he would step to one side and wait for it to get by. He would get down below the ties, if he met the car in the center, where the tower-man goes up in the tower. That at other times when he was not in the center of the bridge he had got out of the way of the car. That persons crossing the bridge at the same time this motor-car was crossing could get out of the way of the car and be in a place of safety. That they could do this either by leaning up against the uprights or by getting down on to the trestle below. That he had seen men crossing the bridge about six o'clock in the evening and meeting the car. That these men would do likewise. That he had seen a good many people [65] meet the trains while they were on the bridge, during his experience at the National. That he never knew of anyone being hurt. As a rule the gas-car was generally across before the witness went across. That the gas-car generally got across about five minutes past six. That this was

(Testimony of A. L. Gabriel.)

generally known among the working men and those living on the west side. That the man shown in the photograph, Defendant's Exhibit "H" was standing on the braces where they all would stand. That if a person met the car while crossing the bridge and got down in the position where that man was such person would be in no danger from the car. That if instead of getting down there a person should stand with his feet on the outer edge of the ties and lean up against the bridge-work or frame-work he would be out of danger there also. That there were several of these plates upon which the man was standing, as shown in the photograph, on each side of the bridge, but he did not know how many.

Testimony of Thos. Steier, Witness on Behalf of Defendant.

THOS. STEIER being called and sworn as a witness on behalf of defendant testified:

That he resided in Hoquiam and had resided there a little over nine years. Was working at the Eureka Mill. That he had worked at the National Mill from 1906 to 1911 and then went to work at the Eureka mill and had been working there ever since. The Eureka Mill was on the east side of the bridge, a little further down towards Aberdeen, or down the railroad track from the National, in the neighborhood of where the Coats Mill is, and right across from the Coats Mill. The railroad tracks run along close to the Coats Mill, Eureka, National and all of the mills. [66]

(Testimony of Thomas Steier.)

That during the period when the witness was working on the east side he was in the habit of crossing on foot this railroad bridge, using the bridge about twice a day, but did miss some days. That generally he would say he crossed the bridge at least once a day during the period of time he was working at Hoquiam. He crossed it in the morning about half past six, in the evening about five or ten minutes to six. That he knew the motor-car that ran across the bridge running between Hoquiam and Montesano. He had met it a number of times on the bridge. That when he met the car he would hold himself to the iron bars. That if one should meet the motor-car while he was on the bridge he could get into a place of safety by stepping onto the ties first and then he could step down to the trestle and be safe between the iron bars and that it would be safe if he put his feet on the outer edge of the ties and leaned up against the frame-work, if he hung himself out. That he had seen quite a few people undertaking to cross the bridge at the same time the motor-car was crossing. That these people to get out of danger, would do the same thing, step to one side of the ties or down to the trestles of the bridge. That he never knew of any person during all these years that he had been crossing there being hurt.

Testimony of G. M. Rogers, on Behalf of Defendant.

G. M. ROGERS, being called and sworn as witness on behalf of defendant testified:

Lived at Hoquiam and had lived there thirteen

(Testimony of G. M. Rogers.)

years or more. Occupation bridge tender for the N. P. Railroad. That this was the same bridge over which the Milwaukee and the defendant operates. That he had been constantly on that bridge all these years as operator. That he remembered the [67] time when the motor-car of the defendant company was supposed to have run into or hit a man on the bridge about two years ago. That he was there at the time he was supposed to have been hit. That his place on the bridge was in the tower-house or engine-room over the turning-gear in the center of the bridge. That is the trains run under the engine-room and under the position of the bridge-tender. He would be about 24 feet over the tracks. That at the time of the accident and for a period of some months prior to that time, in each day of 24 hours, there were 33 time-card trains. Then there was freight and one or two log trains which crossed twice a day, and the switch engines. The number of switch engines would be very hard to estimate because they were very irregular. He had known them to make five round trips across the bridge during the day and once in awhile there would be a day when they would make two round trips. He would put in the neighborhood of about five single trips across there per day. That there would be in the neighborhood of thirty-five or forty trains that would cross the bridge during the day. That there was considerable traffic on the river and a great many boats passing up and down. That he knew of the semaphore, which was on the west of the bridge.

(Testimony of G. M. Rogers.)

That it was there during the time of the accident, but he could not give the date when it went into commission. The witness testified that he recognized the trespass sign shown on the photograph, Defendant's Exhibit "A," as one that was down there, and it was there at the time of the accident and was put up there a few months before that on the east end. That there was one on the west end, the same as that on the east. The one on the west end had been there the same length of time as the one on the east [68] end. That these signs were so plain that any person walking along the track or in the vicinity of the track could see them if they wanted to and that they were put up to be seen and read.

Testimony of S. P. Walters, on Behalf of Defendant.

S. P. WALTERS, being sworn as a witness on behalf of defendant, testified:

Lived at Puyallup and formerly lived at Hoquiam and was a bridge-tender at this bridge from May, 1909, to November, 1914. Was a bridge-tender at the time of the accident. That he never kept an account of the number of trains that crossed the bridge during 24 hours, immediately preceding and for a few months prior to the accident, but it would be considered between thirty and forty. That he knew of the semaphore on the westerly approach of the bridge. Its purpose was to signal trains to go ahead or stop. That this was done by a lever from the power-house. When it is ready for trains *to it* it is thrown into a perpendicular position by the bridge-

(Testimony of S. P. Walters.)

tender. That there was a light on the semaphore, also. A red and a green light. That this semaphore was put up there some time before the accident but he could not remember the date. That looking at Defendant's Exhibit "A," a photograph, he saw thereon the trespass or warning sign and recognized it. That there was a similar trespass sign on each approach to the bridge, east and west, being at each end of the bridge, or trestle-work. That he knew the one on the west end of the bridge was there at the time of the accident and supposed the other was there also, but that he did not see it because he did not live on that side and he very seldom was out there. [69]

Testimony of G. M. Rogers, for Defendant, Recalled.

G. M. ROGERS, being recalled, testified on behalf of defendant, as follows:

That there was at the time witness was testifying a couple of 1x10 planks or 1x12 boards in between the rails on the bridge. That these were put in for the use of the bridge-tenders, for their own use. The lumber belonged to the bridge-tenders and was put in by them, with their own work. This planking was laid in May or June, 1914. That there was nothing between the rails at the time of the accident, no planking and no tin. There was no planking there at all in 1913.

Leon Benezra, Witness for Plaintiff, Recalled in Rebuttal.

LEON BENEZRA, being recalled in rebuttal, on behalf of plaintiff, testified, that the deceased was a good swimmer. That he knew the deceased had been in swimming in this country, that he had been in swimming once with him in Hoquiam by the Lytle Mill, in the swimming hole there at Hoquiam.

Testimony of Theo. Balabanas, Witness for Plaintiff, Recalled in Rebuttal.

THEO. BALABANAS, being recalled in rebuttal, testified: That he saw deceased's dinner pail after he lost sight of deceased at the time of the accident. It was pounded over on one side. He meant by being pounded over on one side that it was knocked too much on one side or smashed.

On cross-examination the witness testified:

That on his direct examination the day previous there was no question asked him about the dinner pail. **[70]**

Testimony of H. V. Dunlap, on Behalf of Plaintiff, in Rebuttal.

H. V. DUNLAP was called and sworn as a witness on behalf of plaintiff, in rebuttal, and testified:

Business, bridge builder. Had been such between eighteen and twenty years. That he had had experience of being on bridge when cars lit by both electricity and acetylene were approaching. He was then asked by plaintiff's counsel the following question. What can you say upon the effect of a

(Testimony of H. V. Dunlap.)

person's judgment as to the distance a car is away from him, upon seeing the car approaching in the night-time with a light on? This was objected to as not proper rebuttal. The objection was sustained and an exception allowed plaintiff. [71]

Defendant, at the close of the testimony moved the Court, in writing, to instruct the jury to return a verdict against the plaintiff Bensoir Penso on the ground that the evidence was insufficient to submit the case to the jury; the motion being in the following language, omitting the title and signature:

[Motions for Directed Verdicts.]

"The evidence being in and both parties having rested the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Bensoir Penso on the ground that the evidence is insufficient to submit the case to the jury."

This motion was denied, defendant excepted to the ruling and the exception was allowed.

Defendant also, at the close of the testimony moved the Court, in writing, to instruct the jury to return a verdict against the plaintiff Esther Romi Pens*o*n on the ground that the evidence was insufficient to submit the case to the jury; the motion being in the following language, omitting the title and signature:

"The evidence being in and both parties having rested the defendant now moves the Court to instruct the jury to return a verdict against the plaintiff Esther Romi Penso on the ground that the evidence is insufficient to submit the case to the jury."

This motion was denied, defendant excepted to the ruling and the exception was allowed. [72]

Instructions.

The Court then instructed the jury as follows:

Gentlemen of the Jury, you will take the pleadings in the case out to your jury-room with you. If you consult these they will show you exactly what the plaintiffs claim in bringing the suit, and exactly what defense the defendant has made to this action. You will have them with you in the jury-room at all times, and you may resort to them and find out just what are the issues in the case. But, briefly, the plaintiffs come into court and aver that one of them is the guardian of the son of this man who was killed and other the wife of the man who was killed. They aver that the deceased Penso was crossing the bridge used by the defendant company, and that for a long time before that this bridge had been permitted to be used and consented to be used by the defendant company, and that this deceased was there at the invitation of the company using it in crossing over this river, and that he was killed through the negligence of the defendant company in operating this car at too great speed over this bridge. Then the amount of damage is averred that came to this boy and this wife by reason of this death so wrongfully caused by the negligence of this defendant company.

The defendant denies that it was negligent and sets up that the deceased was guilty through his own negligence as described in the answer.

The plaintiffs then deny that the deceased was

himself negligent. These are the issues in the case. [73]

A great deal has been said in the case regarding the right of the deceased on this bridge. You will understand that if anyone invites or consents to another person coming on its premises, that while they are on the premises there with such consent, either expressed or implied, that the owner of the premises or the occupant of the premises must exercise ordinary care to keep from injuring all those whom he would anticipate would be using the premises with such consent. Now, this consent may be either expressed or implied. You have a right to conclude that the defendant company consented to the use of this bridge by pedestrians going to and fro across this river, provided it had been for a long time openly and generally used by a large number of the public in so going to and fro across the bridge. Now, I said to you a moment ago that where a person consents to the use of the premises by the presence of persons on those premises, that the owner or occupant must exercise ordinary care to avoid injuring him, so that if you find that this deceased person was there by the consent of the defendant company, then the defendant company in the operation of its cars over the bridge was bound to use ordinary care to avoid injuring the deceased whom it thereby had reason to anticipate might be upon the bridge. As you are well aware, railroad cars must go over the track. There is no way for them to get off and go around anybody who is on the track. They have the right of way, and it is the business of pedestrians

that are using the railroad track for a footpath to use reasonable diligence to get out of the way and let the cars go by, because they cannot **[74]** go anywhere else, because they are large and cumbersome, and it is difficult to stop them. In that sense they have the right of way, but where the operators of a car have reason to anticipate that there may be pedestrians on the track, it is their duty to use reasonable diligence and reasonable and ordinary care to give warning of the approach of their car so that those pedestrians whom they have reason to anticipate are on the track may have reasonable opportunity to get out of the way, and if they fail to use ordinary care in the speed at which they operate the car, or the warnings which they give, or the lookout which they keep to advise those whom they may have reason to believe are using the way as a footpath, for them to get out of the way, they would be negligent.

The deceased man while using the footpath on the bridge, in going across this river, was bound to use ordinary care for his own safety, and if he failed to use ordinary care to keep or get out of the way of the approaching car, the plaintiffs in this case cannot recover even though you should find from a fair preponderance of the evidence that the defendant company, or its operatives, were negligent in the operation of the car.

Before the plaintiffs can recover in this case, they must establish by a fair preponderance of the evidence every material allegation in their complaint which is denied. Among those allegations in the

complaint which must be established by a fair preponderance of the evidence is first that one is the wife and the other the son of the man who, [75] was killed. Next, they must show that the defendant company was negligent in the manner which they allege in their complaint, and that that negligence was the proximate cause of the death of the deceased Penso. Another material allegation is the amount of the damage they claim to have suffered, or at any rate, that they did suffer some damage, that is, they must prove by a fair preponderance of the evidence that the continued life of the deceased Penso would have been a substantial benefit to them in a material sense.

In these instructions I have used the expressions, "preponderance of the evidence" and "proximate cause." Proximate cause is the moving, direct, efficient cause of an event, that cause which, moving in direct sequence, uninterrupted by any other efficient cause, produces a result.

The preponderance of the evidence, all I can say to you about that is that that evidence preponderates which is of such a nature, which so appeals to your experience and intelligence as to create and induce belief in your minds.

If a man in the operation of a car, the engineer in the operation of the car along the tracks, sees some one ahead of him that is in a place of safety, or who apparently has an opportunity to get out of the way of the car before it will make the point where he is, to get to a place of safety, he is not guilty of negligence in conducting his car along the track and tak-

ing it for granted that he will remain in a place of safety where he is, or will avail himself of that opportunity to get out of danger before the car **[76]** reaches him. Before he can be guilty of negligence, there must be something in the condition of the man, or the situation to advise him that if he continues with his car along the track, that the man is likely to be hurt. That instruction is given you in view of the testimony of the engineer that he did see the man. Of course, I have already advised you that it would be the duty if, under the instructions I had given you, the engineer had reason to anticipate that there would be men *or* this bridge, to keep a lookout, and that if he did not keep a lookout he would be negligent. That instruction is applicable to the testimony of the engineer that he did actually see this man.

The defendant, having alleged contributory negligence on the part of the deceased, which it is averred proximately contributed to his death, if you get to that phase of the case, the burden of establishing the deceased's negligence and that it proximately contributed to his death, rests upon the defendant.

The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased? If there is a fair preponderance of the evidence that one was the wife, and is to-day the widow, and that the other was the son, then the next step would be logically to deter-

mine whether the deceased himself contributed in any way proximately to his own death, by his own negligence. [77] If you find by a fair preponderance of the evidence that he did so, you would stop there and return a verdict for the defendant. If you find that he was not himself guilty of contributory negligence, you would then pass to the next point to determine whether the defendant, in any of the manners described in the complaint, was guilty of negligence, and whether it proximately contributed to the death of the deceased. If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental considerations and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, or husband but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso.

I have advised you about proximate cause. You will understand that if the deceased saw, or knew in any *what* that that car was coming, the failure to give a signal of the approach of the car would not be a proximate cause, because the only way in which failure to give a signal would be a proximate cause of the injury would be that if it had been given it would have warned the man of the approach of the car, but if he knew it, without a signal why it would not be necessary to warn him.

The Court will read to you certain instructions which have been prepared, and in so far as they may be repetition of what I have already told you, you are not to conclude that the Court is bearing down upon one portion of [78] this case, thereby seeking to impress you with its importance over those which are not repeated.

If you believe that the public were accustomed to travel over this bridge, then the fact that company posted no trespass signs would not absolve the company from its duty to use reasonable care in the operation of its cars, if it knew that persons still continued to walk on its tracks over the bridge, as had been the custom before the notices were posted, and for a considerable time prior to the accident.

You are instructed that there is no issue as to whether or not the engineer and crew in charge of the car was competent or not. You cannot base any negligence on the defendant company upon the assumption, or find that incompetent men were employed by the company.

You are instructed that under the evidence in this case the bridge in question was private property of the Northern Pacific Railway Company, and was used by the defendant, and if it be a fact that the bridge was over navigable waters and extended between the ends of streets in the city of Hoquiam, did not give the deceased or the public any greater rights over or upon the bridge than if the bridge had been entirely upon and joining on private property.

But if you find that at the time of the accident the defendant company was negligently operating its

cars, you are instructed that it would not then be liable in this action if the person injured or killed, if that were the fact, was guilty of failing to use ordinary care and caution to protect himself, and if he in any way contributed by his own negligence or carelessness to the injuries, even though **[79]** you find that the employes of the railroad company were negligent.

You are instructed that the fact, if it is a fact, that the deceased referred to in the testimony was a foreigner, or of a nationality other than that of the United States in no way *affect* any issues in this case. He is to be judged in his act by the same standard that governs the conduct of all persons in the exercise of their senses, using that precaution which ordinary prudent men would use under like circumstances.

You are instructed that the law does not require a railroad company to stop its trains simply because there are travelers upon its tracks. The mere fact that a person is seen walking in front of a train, in the direction of a moving engine, is not, as a matter of law, required to bring its car or train to a stop.

It is as much the duty of the pedestrian traveling along a highway or any place used as a highway to use his sight and hearing, as it is for the engineer of an approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume that the party walking upon the tracks, as dis-

closed by the evidence, would himself get out of the way of the approaching train or car, unless there was something in the situation to advise the engineer that it would be unsafe to do so.

The railroad company is not an insurer against injuries, and negligence must be shown of some character before **[80]** a railroad company can be held liable for killing or injuring a traveler. It is not sufficient to find that the traveler was injured or killed. The burden of proof is upon the plaintiff in this action in this connection.

That plaintiffs herein are not entitled to a verdict at your hands unless you believe from a fair preponderance of the evidence that the deceased, Haim Jack Penso, met his death at the proximate result of negligence on the part of the defendant railroad company. If you believe from a fair preponderance of the evidence that the defendant was not guilty of negligence which was the proximate cause of the said Penso's death, then, of course, your verdict must be for the defendant. On the other hand, if you believe from a fair preponderance of the evidence that the defendant was negligent in the operation of its train, and you further believe from a fair preponderance of the evidence that the said deceased was also negligent, and that the negligence of both the said defendant and the said deceased contributed to the death of said Penso, then, under those circumstances, the plaintiffs would not be entitled to a verdict, but your verdict, on the contrary, should be for the defendant. Plaintiffs are not entitled to a verdict at your hands if you are satisfied from a fair

preponderance of the evidence that the said deceased was guilty of such negligence as proximately contributed to his own damage.

The jury is not permitted to guess or speculate as to how the deceased met his death. Before you can return any verdict in favor of plaintiffs, the testimony must show you the manner in which the deceased was killed, and that such death was the result of the negligence of the defendant. [81] The jury must not return a verdict herein based upon testimony which to the mind of the jury shows that the deceased might have been injured in this way or that way, or in this manner, or that manner, but the testimony must satisfy the mind of the jury as to how such accident happened, and what was the manner and cause of such death.

In these instructions I have several times used the expression "ordinary care," and "negligence." Negligence, in the sense in which it has been used in these instructions, means the want of ordinary care, Ordinary care means the care an ordinarily careful and prudent person would use under the same circumstances, and should always be proportioned to the peril or danger reasonably to be apprehended from the want of proper prudence.

You are in this case, as in every case where questions of fact are submitted to a jury for determination, the sole and exclusive judges of every question of fact in the case. This would include all of those issues of fact which I have submitted to you, and the weight of the evidence and the credibility of the witnesses. In weighing the evidence and determin-

ing what credibility should be given each of the witnesses who have come before you and testified, you should take into account the manner in which they gave their testimony, their appearance and demeanor upon the witness-stand, whether they carried to your minds the belief that they were trying to tell you the exact truth of what they had seen or heard, or whether they were reluctant, kept back something, or whether, on the other hand they were too willing, running along and volunteering testimony about which no questions were asked. **[82]**

You will take into account the testimony of each witness, whether it appears to be a total and complete story, whether it is reasonable, whether you would expect it to be corroborated, if true, or whether it is contradicted.

You will view the testimony of each witness who came before you from at least two points, that is the opportunity the witness had to tell you the whole truth about which he testified, and then whether he wanted to tell you all of the truth. One witness may be much more favorably situated than any other to know all about what happened, or to see the disputed transactions, and others may be equally positive about it, may be equally honest, but had not the same opportunity to see just what happened. You will also take into account any interest any witness may have in this case, either by the manner in which he gave his testimony or by his relation to the case. **[83]**

Before the Court instructed the jury, and at the

proper time, the defendant requested, in writing, the Court to give certain instructions to the jury.

[Instructions Requested by Defendant.]

The instructions asked for by defendant, which were not given by the Court were as follows:

1. "You are instructed to return a verdict in this case for the defendant. Under the testimony the evidence does not justify a rendition of a verdict against the defendant." Which instruction was refused by the Court, the defendant excepted thereto and the exception was allowed.

2. "You are instructed that you cannot return a verdict in favor of the plaintiff Esther Romi Penso, widow of the alleged deceased, in any event. Which instruction was refused by the Court, the defendant excepted thereto and the exception was allowed.

3. You are instructed that as to the plaintiff Bensoir Penso, the alleged minor, you cannot return any verdict in his favor for any damages whatsoever, nor in favor of his guardian *ad litem*. The evidence is insufficient to justify any verdict of the jury in his favor, or any allowance of damages in connection therewith." Which instruction was refused by the Court, the defendant excepted thereto and the exception was allowed.

4. "In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you cannot find any neg-

ligence based upon the fact that the bell was not rung." Which instruction was refused by [84] the Court, defendant excepted thereto and the exception was allowed.

5. "Likewise the same is true as to whether there was a warning given by whistle or not." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

8. "You are instructed that the evidence shows that the deceased, for whose death this action is brought, was guilty of contributory negligence and your verdict must be for the defendant." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

11. "It is as much the duty of the pedestrian traveling along a highway or any place used as a highway to use his sight and hearing, as *it for* the engineer of an approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume that the party walking upon the tracks, as disclosed in the evidence, would himself get out of the way of the approaching train or car." [85]

12. "You are instructed that the fact that the party claimed to have been killed for a long period of time prior to the accident travelled in the morning to his work over a right of way and bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged

deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

14. "That the fact that the said Penso, whom it is claimed was killed, could not read or write the English language or any language is not a circumstance which you shall consider in determining the question of negligence on the part of the company or the question of his contributory negligence." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

17. "If you believe from a fair preponderance of the evidence that at or prior to the time the deceased undertook to cross the bridge in question, he knew, or by the exercise of reasonable care and caution should have known, that one of the defendant's cars or trains would be crossing such bridge at the same time that the [86] deceased would be crossing it, then the deceased would be guilty of such contributory negligence and assumption of risk, as that the plaintiffs could not recover herein, and your verdict should be for the defendant. In this connection you should take into consideration whether or not the schedule time for the said motor car to cross the said said bridge was about six o'clock, and whether or

not the defendant habitually so operated its said motor-car across such bridge at such time, and whether the deceased knew, or by the exercise of reasonable care and caution could have known, that the said defendant would be running the said motor car across the said bridge at the same time the deceased undertook to pass over it at the time of the injury, then, and under those circumstances, the deceased would be guilty of both assumption of risk and contributory negligence, and the plaintiffs could not recover and your verdict should be for the defendant. If you believe that the deceased knew, or should have known, that he would meet the said motor-car on such bridge at the same time he undertook to cross over the same, the deceased would be guilty of such negligence as would preclude any recovery by the plaintiffs herein, and this regardless of the fact as to whether or not the defendant was guilty of negligence." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

18. "The fact that the bridge in question spans the river at a prolongation of one of the streets in the city of Hoquiam could not in any manner or way affect the duties or obligations [87] of either or of any of the parties hereto." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

19. "You are instructed that if you believe from the evidence that the deceased saw, or by the exercise of reasonable care and caution could have seen, that the motor-car was approaching the bridge, or

was coming on the same, and you further believe that the deceased could at that time have gotten into a place of safety on such bridge and thus avoided being injured, then the deceased would be guilty of negligence contributing to his own injury and your verdict must be for the defendant." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

20. "If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you further believe that the deceased, immediately prior to going on the said bridge, knew or by the exercise of reasonable care should have known that he would meet the said motor-car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant." Which instruction was refused by the Court, defendant excepted thereto and the exception was allowed.

Instruction No. 11, asked for by defendant, abovementioned, was given as asked, but the Court at the end of the [88] instruction *the Court* added the following modification thereto: "Unless there was something in the situation to advise the engineer that he would be unable to do so." To this modification by the Court the defendant excepted, upon the ground that the modification was inapplicable to

the facts; the undisputed testimony showing that there was nothing in the situation or circumstances of the case that would tend to so advise the engineer.

The above exceptions to the refusal of the Court to give instructions were all taken and allowed at the proper time before the retirement of the jury.

The defendant, after the Court's instructions were given, in the presence of the jury and before it retired, made the following exceptions to the Court's charge:

[Exceptions to Instructions.]

Defendant excepted to all that part of the Court's charge which reads as follows:

"The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there is a fair preponderance of the evidence that one was the wife and is to-day the widow, and that the other was the son, then the next step would be logically to determine whether the deceased himself contributed in any way proximately to his own death, by his own negligence." Upon the ground that no damages could be awarded to the minor; and also upon the grounds that damages could not be united in one verdict for both plaintiffs jointly.

The defendant also excepted to all that part of the Court's instructions which read as follows: **[89]**

Defendant also excepted to all that part of the Court's instructions which reads as follows:

"If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would

then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental consideration, and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso." Upon the ground that no damages could be awarded to the minor, in any event, under the proof in the case; also upon the ground that damages could not be united in one verdict for both plaintiffs jointly. The exceptions were allowed.

After the instructions were given and the exceptions taken as aforesaid the jury retired and thereafter on October 28, 1915, returned a verdict in favor of plaintiffs, and assessed their damages at the sum of $2,500; the verdict, omitting the title and signatures being as follows:

We, the jury impaneled in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of Twenty-five Hundred Dollars ($2,500). **[90]**

Service of the within and foregoing bill of exceptions prepared and proposed by defendant is admitted at Hoquiam, Washington, this 4th day of December, 1915.

MORGAN & BREWER and
A. EMERSON CROSS,
Attorneys for Plaintiff.

(Filed Dec. 7, 1915.) **[91]**

Order Settling Bill of Exceptions.

On this 20th day of December, 1915, the above-entitled cause coming on to be heard upon application of defendant to settle a bill of exceptions in said cause and in accordance with stipulation and order of the Court heretofore made, and it appearing to the Court that the bill exceptions was duly served on the attorneys for plaintiff within the time provided by law and that the attorneys for plaintiff have suggested amendments thereto, which amendments have been accepted by the defendant and have been incorporated in the bill of exceptions, and all the parties consenting to the settling of the same and that the time for settling said bill of exceptions has not expired; the same having been extended from time to time by stipulation and order of the Court for the reason that additional time has been required and

It further appearing to the Court that the bill of exceptions contains all the facts occurring in the trial of said cause, together with the exceptions thereto, and all the matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of the bill of exceptions and the clerk of this court is [92] hereby instructed to properly mark and identify such exhibits and attach the same thereto, and in case it is inconvenient and not practicable to attach any exhibit or exhibits to properly identify it or them in the cause and to forward them as a part of the bill of exceptions.

Thereupon, upon motion of the defendant, Oregon-Washington Railroad & Navigation Co., it is.

ORDERED that said proposed bill of exceptions be and is hereby settled as a true bill of exceptions in said cause and that the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions and the clerk is hereby ordered to file the same as the record in said cause and to transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,
Judge.

(Filed Dec. 20, 1915.) [93]

Order Allowing Writ of Error.

On motion of the defendant it is hereby ordered that a writ of error is hereby allowed as prayed for in the petition for writ of error filed herein to have the said cause reviewed in the United States Circuit Court of Appeals for the Ninth Circuit and a writ of error and citation is hereby directed to be issued and certified transcript of the record, testimony, exhibits, stipulations and all proceedings be transmitted to said Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of Four Thousand Dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on the appeal.

Dated this 5th day of January, 1916.

EDWARD E. CUSHMAN,
Judge.

(Filed Jan. 5, 1916.) [94]

Assignment of Errors.

Comes now the Oregon-Washington Railroad & Navigation Company, a corporation, defendant above named, and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above case from the judgment made and entered by this Honorable Court on the 1st day of November, 1915.

The Court erred in permitting plaintiffs to offer in evidence a certified copy of the plat of Hoquiam Tide and Shore Lands and the dedication thereof, as made by the Commissioner of Public Lands of the State of Washington, for the purpose of showing the nature of the street over which the railroad ran and upon which the bridge mentioned in the complaint was located, being Plaintiff's Exhibit I; which exhibit was introduced in evidence over the objection of defendant; objections being upon the ground that the same was immaterial and it made no difference whether the bridge was a prolongation of the street or not. [95]

2.

The Court erred in admitting in evidence plaintiffs' Exhibit II, being a certified copy of the rededication of the same lands referred to in the last objection by the same office; being plat No. 2, Hoquiam

Tide and Shore Lands and purporting to show the railroad bridge in question; over the objections of defendant; objections being upon the same ground as made in the preceding assignment of error.

3.

The Court erred in admitting in evidence Plaintiffs' Exhibit III, being ordinance No. 70 of the City of Hoquiam granting a franchise to the railway company to operate over this street; over the objections of counsel for defendant, which were upon the ground that it was immaterial.

4.

The Court erred in admitting in evidence Plaintiffs' Exhibit IV, being the proceedings of the city council of the city of Hoquiam, showing the transfer of the ordinance above referred to to the Northern Pacific Railway Company, over the objection of defendant's counsel that it was immaterial.

5.

The Court erred in overruling, at the close of plaintiffs' testimony the motion of defendant for a nonsuit, which motion was based upon the grounds that the evidence was insufficient to show negligence on the part of the defendant company; also upon the ground that the evidence showed that the deceased was guilty of contributory negligence, also that it was not shown that deceased and Esther Romi Penso were husband and wife, or that either of the plaintiffs **[96]** were dependent upon the deceased for support.

6.

The Court erred in refusing to instruct the jury to return a verdict against the plaintiffs at the close of all the testimony, upon the motion of the defendant; which motion was based upon the ground that the evidence was insufficient.

7.

The Court erred in refusing to instruct the jury, in writing, at the close of the testimony, upon the motion of the defendant, to return a verdict against the plaintiff Esther Romi Penso upon the ground that the evidence was insufficient to justify a recovery.

8.

The Court erred in refusing to instruct the jury, in writing, at the close of the testimony, upon the motion of the defendant, to return a verdict against the plaintiff Bensoir Penso upon the ground that the evidence was insufficient to justify a recovery.

9.

The Court erred in refusing to give instruction No. 1, at the request of defendant, which instruction is as follows: "You are instructed to return a verdict in this case for the defendant. Under the testimony the evidence does not justify a rendition of a verdict against the defendant."

10.

The Court erred in refusing to give instruction No. 2, at the request of the defendant, which instruction is as follows: "You are instructed that you cannot return a [97] verdict in favor of Esther Romi

Penso, widow of the alleged deceased, in any event.

11.

The Court erred in refusing to give instruction No. 3, at the request of defendant, which instruction is as follows: "You are instructed that as to the plaintiff Bensoir Penso, the alleged minor, you can not return any verdict in his favor for any damages whatsoever, nor in favor of his guardian *ad litem*. The evidence is insufficient to justify any verdict of the jury in his favor, or any allowance of damages in connection therewith."

12.

The Court erred in refusing to give instruction No. 4, at the request of the defendant, which instruction is as follows: "In view of the fact that all the testimony discloses that the engine in question was lighted by a headlight that could be seen for a long distance you are instructed that the question whether the bell was rung or not on the car just prior to the accident is immaterial in this case and you can not find any negligence based upon the fact that the bell was not rung."

13.

The Court erred in refusing to give instruction No. 8, at the request of the defendant, which instruction is as follows: "You are instructed that the evidence shows that the deceased, for whose death this action is brought, was guilty of contributory negligence and your verdict must be for the defendant."

14.

The Court erred in refusing to give instruction

No. 11, at the request of the defendant, which instruction is as follows: "It is as much the duty of the pedestrian traveling [98] along a highway or any place used as a highway to use his sight and hearing, as it is for the engineer of any approaching train to keep a lookout for danger, and if the engineer of the car saw the plaintiff walking in the ordinary and customary way upon the track, it was not the duty of the engineer to stop the car on account thereof, but he had the right to assume that the party walking upon the tracks, as diclosed by the evidence, would himself get out of the way of the approaching train or car."

15.

The Court erred in refusing to give instruction No. 12, at the request of the defendant, which instruction is as follows: "You are instructed that the fact that the party claimed to have been killed for a long period of time prior to the accident traveled in the morning to his work over a right of way and bridge across the river at some distance from where this railroad bridge was operated is a circumstance which you should consider in determining whether the alleged deceased was guilty of contributory negligence. The testimony discloses that he could go to his work, and did go to his work in the morning by a route over which there were no trains operated, and this being so you have a right to take this circumstance into consideration in determining whether he was guilty of contributory negligence in going upon the bridge where it is claimed he was killed."

16.

The Court erred in refusing to give instruction No. 14, at the request of the defendant, which is as follows: "That the fact that the said Penso, whom it is claimed was killed, [99] could not read or write the English language or any language is not a circumstance which you shall consider in determining the question of negligence on the part of the company or the question of his contributory negligence."

17.

The Court erred in refusing to give instruction No. 17, at the request of the defendant, which instruction is as follows: "If you believe from a fair preponderance of the evidence that at or prior to the time the deceased undertook to cross the bridge in question, he knew, or by the exercise of reasonable care and caution should have known, that one of the defendant's cars or trains would be crossing such bridge at the same time that the deceased would be crossing it, then the deceased would be guilty of such contributory negligence and assumption of risk, as that the plaintiffs could not recover herein, and your verdict should be for the defendant. In this connection you should take into consideration whether or not the schedule time for the said motor-car to cross the said bridge was about six o'clock, and whether or not the defendant habitually so operated its said motor-car across such bridge at such time, and whether the deceased knew, or by the exercise of reasonable care and caution could have known, that the said defendant would be run-

ning the said motor-car across the said bridge at the same time the deceased undertook to pass over it at the time of the injury, then, and under those circumstances, the deceased would be guilty of both assumption of risk and contributory negligence, and the plaintiffs could not recover and your verdict should be for the defendant. If you believe that the deceased knew, or should have known, that he would meet **[100]** the said motor-car on such bridge at the same time he undertook to cross over the same, the deceased would be guilty of such negligence as would preclude any recovery by the plaintiffs herein, and this regardless of the fact as to whether or not the defendant was guilty of negligence."

18.

The Court erred in refusing to give instruction No. 18, at the request of defendant, which instruction is as follows: "The fact that the bridge in question spans a river at a prolongation of one of the streets in the city of Hoquiam could not in any manner or way affect the duties or obligations of either or any of the parties hereto."

19.

The Court erred in refusing to give instruction No. 19, at the request of defendant, which instruction is as follows: "You are instructed that if you believe from the evidence that the deceased saw, or by the exercise of reasonable care and caution could have seen, that the motor-car was approaching the bridge, or was coming on the same, and you further believe that the deceased could at that time have gotten into a place of safety on such bridge and

thus avoided being injured, then the deceased would be guilty of negligence contributing to his own injury and your verdict must be for the defendant.

29.

The Court erred in refusing to give instruction No. 20, at the request of the defendant, which instruction is as follows: "If you believe from the evidence that it was dangerous to undertake to cross over the said bridge at the same time a car or train was crossing over the same and you [101] further believe that the deceased, immediately prior to going on the said bridge, knew or by the exercise of reasonable care should have known that he would meet the said motor-car or other car or trains on such bridge, if he undertook to cross the same at the time he did undertake to cross, then the deceased would be guilty of such contributory negligence and assumption of risk as would defeat any recovery for the plaintiffs herein, and under those circumstances your verdict must be for the defendant."

21.

The Court erred in modifying instruction No. 1, above set forth, by adding and giving to the jury, the following, as a part thereof: "Unless there was something in the situation to advise the engineer that he would be unable to do so."

22.

The Court erred in giving to the jury the following instruction: "The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there

is a fair preponderance of the evidence that one was the wife and is to-day the widow, and that the other was the son, then the next step would be logically to determine whether the deceased himself contributed in any way proximately to his own death, by his own negligence." For the reason that no damages could be awarded to the minor, and also that damages could not be united in one verdict for both plaintiffs jointly. [102]

23.

The Court erred in giving the jury the following instruction: "If you find that the defendant was so negligent, by a fair preponderance of the evidence, you would then pass to what recovery should be awarded the plaintiffs in this case. In assessing the amount of recovery, you would not be influenced by any sentimental consideration, and you would not allow any damage for merely grief, or injury to the feelings which may have resulted from the loss of the parent, but you would confine your verdict to such an amount as would fairly compensate the plaintiffs in this cause for the death of the deceased Penso." For the reason that no damages would be awarded to the plaintiffs in any event under the proof in this case, and also that damages could not be united in one verdict for both plaintiffs jointly.

24.

The Court erred in rendering judgment in the case

in favor of the plaintiffs.

J. B. BRIDGES,
BRIDGES & BRUENER,,
BOGLE, GRAVES, MERRITT & BOGLE,
SULLIVAN & CHRISTIAN,

Attorneys for Defendant and the Plaintiff in Error.

(Filed Jan. 5, 1916.) [103]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That the Oregon-Washington Railroad & Navigation Company, a corporation, and National Surety Company, a corporation, are held and firmly bound unto the above-named Esther Romi Penso and Bensoir Penso in the sum of Four Thousand Dollars for the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 5th day of January, 1916.

Whereas, the above-named Oregon-Washington Railroad & Navigation Company, a corporation, has prosecuted a writ of error to reverse the judgment of said District Court, rendered on the 1st day of November, 1915, in favor of said Esther Romi Penso and Bensoir Penso and against the said Oregon-Washington Railroad & Navigation Company, a corporation, for the recovery of the sum of Twenty-five Hundred Dollars.

NOW, THEREFORE, THE CONDITION OF THIS BOND is such that if the above-named Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute said writ of error to effect and answer all damages and costs if it fail [104] to make said appeal good this obligation shall be void, otherwise same shall remain in full force and virtue.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY.
By J. B. BRIDGES,
BRIDGES & BRUENER,
SULLIVAN & CHRISTIAN,
Its Attorneys.

NATIONAL SURETY COMPANY. (Seal)
By R. E. MAHAFFAY,
Resident Asst. Secretary.
By R. E. EVANS,
Resident Vice-President.

The above bond is hereby approved as a cost and supersedeas bond this 5th day of January, 1916.

EDWARD E. CUSHMAN,
District Judge.

Doc. Int. Rev. stamps affixed.
(Filed Jan. 5, 1916.) [105]

Stipulation as to the Original Exhibits.

It is hereby stipulated between the plaintiff and defendants that the original exhibits introduced in evidence in the trial of the cause in the court below may be transmitted to the Court of Appeals with the

transcript of the record in lieu of copies; most of the exhibits being photographs and diagrams requiring an inspection of the original exhibit.

It is further stipulated that the Judge who tried the cause in the court below may make an order to this effect.

J. B. BRIDGES,
BRIDGES & BRUENER,
SULLIVAN & CHRISTIAN,
Attorneys for Plaintiff in Error.
MORGAN & BREWER and
A. EMERSON CROSS,
Attorneys for Defendants in Error.

(Filed Jan. 12, 1916.) [106]

Order Directing Original Exhibits Instead of Copies to be Forwarded to the Circuit Court of Appeals.

Now, on this 12th day of January, 1916, upon stipulation of the respective parties, through their attorneys, and it appearing that the original exhibits will be needed for inspection upon the hearing of the writ of error, it is hereby

ORDERED that the clerk of this court transmit to the Circuit Court of Appeals, either by attaching to the bill of exceptions, or by otherwise forwarding, properly identified, the original exhibits introduced in evidence in the trial of this cause.

EDWARD E. CUSHMAN,
Judge.

(Filed Jan. 13, 1916.) [107]

Stipulation [Relating to Transcript].

It is hereby stipulated by and between the respective parties that the transcript on appeal made by the clerk of the District Court may omit therefrom the caption, excepting on the complaint, with all endorsements, verifications and acceptances of service.

J. B. BRIDGES,
BRIDGES & BRUENER,
SULLIVAN & CHRISTIAN,
Attorneys for Plaintiff in Error.
MORGAN & BREWER and
A. EMERSON CROSS,
Attorneys for Defendants in Error.

(Filed Jan. 12, 1916.) [108]

Admission of Service [of Order Allowing Writ of Error, etc.].

We hereby admit service upon plaintiffs of the following papers filed in the clerk's office of the United States District Court for the Western District of Washington, Southern Division, in the above-entitled action, on the 5th day of January, 1916.

Order allowing writ of error to be prosecuted, and fixing the amount of bond.

Supersedeas and cost bond on writ of error.

Assignment of errors.

Dated this 8th day of January, 1916.

MORGAN and BREWER, and
A. EMERSON CROSS,
Attorneys for Plaintiffs.

(Filed Jan. 12, 1916.) [109]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the above-entitled cause, to wit; Esther Romi Penso and Bensior Penso by his guardian *ad litem* Leon Benezra, vs. Oregon-Washington Railroad & Navigation Company, a corporation, as the same remains of record and on file in my office, in said District, at Tacoma, and that the same is made pursuant to praecipe of counsel filed herein, and the same constitutes my return on the annexed writ of error.

I further certify and return that I hereto attach and herewith transmit the original writ of error and original citations, with original acceptances of service thereon, and original prayer for reversal; and that under separate cover I am certifying the original exhibits as per stipulation of counsel.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate and return, 283 folios, @ 15¢..... 42.45

Certificate of clerk to transcript of record, 3 folios @ 15¢ each..... .45
Seal to said certificate..... .20
Certificate and seal as to the original exhibits, 1 folio..... .25

[110]

ATTEST MY OFFICIAL SIGNATURE and the seal of the said United States District Court for the Western District of Washington, at Tacoma, this 18th day of January, A. D. 1916.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. [111]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO, by His Guardian *ad Litem*, LEON BENEZRA,
Defendants in Error.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment before you between said Esther Romi Penso and Bensoir Penso, by his guardian *ad litem* Leon Benezra, plaintiffs, and Oregon-Washington Railroad & Navigation Company, a corporation, defendant, a manifest error hath happened to the great damage of said Oregon-Washington Railroad & Navigation Company, we being willing that such error, if any hath happened, should be duly corrected, and full and speedy justice done to the defendant aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, State of California, together with this writ, so that you have the **[112]** same at said place, before the Justices aforesaid, on or before the 3d day of February, 1916; that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error,

what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 5th day of January, 1916, and of the Independence of the United States the one hundred and fortieth.

[Seal] FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington.

By E. C. Ellington,
Deputy Clerk.

The foregoing writ is hereby allowed this 5th day of January, 1916.

EDWARD E. CUSHMAN,
Judge. **[113]**

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso et al., Defendants in Error. Writ of Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO, by His Guardian *ad Litem*, LEON BEN-EZRA,
Defendants in Error.

Citation [Original].

United States of America,—ss.

To Esther Romi Penso and Bensoir Penso:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Western District of Washington, Southern Division, wherein Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error and you are the defendants in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected nd why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 5th day of January, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth.

[Seal] EDWARD E. CUSHMAN,
District Judge. **[114]**

Service of the within citation is hereby acknowledged, by receipt of copy, this 5th day of January, 1916.

~~EDWARD E. CUSHMAN,~~
Attorneys for Defendants in Error. **[115]**

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso et al., Defendants in Error. Citation.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO, by His Guardian *ad Litem*, LEON BENEZRA,
Defendants in Error.

Admission of Service [of Citation and Writ of Error].

We hereby admit service upon us in the Western District of Washington, Southern Division, on the 8th day of January, 1916, of the citation issued in the above-entitled court on the 5th day of January, 1916, and of the writ of error issued in the above cause on the 5th day of January, 1916, the originals of which citation and writ of error are on file in the office of the clerk of the District Court of the United States for the Western District of Washington, Southern Division, at Tacoma, Washington.

MORGAN and BREWER, and
A. E. CROSS,
Attorneys for Defendants in Error. [116]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso et al., Defendants in Error. Acceptance of Service. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 12, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Plaintiff in Error,

vs.

ESTHER ROMI PENSO and BENSOIR PENSO, by His Guardian *ad Litem*, LEON BENEZRA,

Defendants in Error.

Prayer for Reversal.

Comes now the Oregon-Washington Railroad & Navigation Company, a corporation, the plaintiff in error, and prays for a reversal of the judgment of the District Court of the United States for the Western District of Washington, Southern Division, in the action brought by Esther Romi Penso and Bensoir Penso by his guardian *ad litem*, Leon Benezra, plaintiffs, and defendants in error, against the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, and plaintiff in error herein, which judgment was entered in the office of the clerk of the said court on the 1st day of November, 1915, and was for the recovery of Twenty-five

Hundred Dollars, together with costs and disbursements of action.

J. B. BRIDGES,
BRIDGES & BRUNNER,
BOGLE, GRAVES, MERRITT & BOGLE,
SULLIVAN & CHRISTIAN,
Attorneys for Plaintiff in Error, 1507 National Realty Building, Tacoma, Washington. **[117]**

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso et al., Defendants in Error. Prayer for Reversal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 5, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2739. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Esther Romi Penso and Bensoir Penso, by His Guardian *ad Litem*, Leon Benezra, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed January 22, 1916.

F. D. MONCKTON,
Clerk.

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Certificate of Clerk U. S. District Court to Original Exhibits.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the enclosed are the original exhibits introduced at the trial in the case of Esther Romi Penso and Bensoir Penso, by his guardian *ad litem*, Leon Benezra, vs. Oregon-Washington Railroad & Navigation Company, a corporation, No. 1585, in this Court at Tacoma, on behalf of the plaintiff and the defendant, to wit:

Plaintiff's Exhibit 1—Blue-print;
Plaintiff's Exhibit 2—Blue-print;
Plaintiff's Exhibit 3—Cert. copy Ordinance # 70;
Plaintiff's Exhibit 4—Cert. Copy Assignment franchise, etc.
Plaintiff's Exhibit 5—Photo;
Plaintiff's Exhibit 6—Photo;
Plaintiff's Exhibit 7—Photo;
Plaintiff's Exhibit 8—Photo;
Defendant's Exhibit "A"—Photo;
Defendant's Exhibit "B"—Photo;
Defendant's Exhibit "C"—Photo;
Defendant's Exhibit "D"—Photo;
Defendant's Exhibit "E"—Photo;
Defendant's Exhibit "F"—Photo;
Defendant's Exhibit "G"—Photo;
Defendant's Exhibit "H"—Photo;

ATTEST My official signature and the seal of this Court, in said District, this 18th day of January, A. D. 1916.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk.

Received Jan. 21, 1916. F. D. Monckton, Clerk.

[Endorsed]: No. 2739. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, vs. Esther Romi Penso et al. Certificate of Clerk U. S. District Court Re Exhibits. Filed Jan. 22, 1916. F. D. Monckton, Clerk.